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A TREATISE
ON THE
LAW OF DEEDS

**THEIR FORM, REQUISITES, EXECUTION, ACKNOWLEDGMENT, REGIS-
TRATION, CONSTRUCTION AND EFFECT.**

COVERING

**THE ALIENATION OF TITLE TO REAL PROPERTY BY VOL-
UNTARY TRANSFER.**

TOGETHER WITH CHAPTERS ON TAX DEEDS AND SHERIFF'S DEEDS.

BY
ROBERT T. DEVLIN
COUNSELOR AT LAW.

SECOND EDITION REVISED AND ENLARGED
IN THREE VOLUMES.

Volume I.

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PREFACE TO SECOND EDITION.

THE lapse of ten years since this treatise was written has rendered a new edition necessary. During that time I have examined the cases that have been decided since the first edition went to press, and have made such use of them as seemed best adapted to this edition. Some of them are simply affirmations of well-established principles of law, and their citation would serve no other purpose than as cumulative authorities to lists already too numerous. Others involve only questions of fact; others still are based upon special statutes, but many which state no new principle of law yet show its application to some novel condition of affairs, or make clear some rule on which courts have not agreed.

Many new sections have been added to the text; others have been rewritten or enlarged, and ample additions have been made to the notes.

I have at all times kept in mind the fact that a work intended for a practicing lawyer should contain many different features, and I have in the insertion of new matter followed the same general outlines described in the original preface as the plan of this treatise. The enormous number of new cases considered has necessitated the extension of the work to three volumes.

Special attention has been given to those topics that relate particularly to the form, execution, acknowledg-

ment, delivery, and registration of deeds, description of property conveyed, and kindred subjects relating to deeds, considered as instruments intended to convey title to land. Still, their effect as executed contracts has been exhaustively considered. Every chapter has been revised and enlarged, and the new matter inserted has been thoroughly indexed.

It has been my aim to make this treatise a practical exposition of the law of real property and to treat fully all subjects relating to the transfer of title to land by the deed or voluntary act of the parties.

The favor with which the original edition was received, while it demonstrated the necessity for a work on the subject treated, has been gratifying to me in showing that these volumes in a measure supplied the want. I gratefully appreciate the consideration which this work has met, and hope that the second edition will be as favorably received.

ROBERT T. DEVLIN.

Sacramento, Cal., Feb. 1, 1897.

PREFACE TO FIRST EDITION.

FROM the earliest times, the law of the alienation of real property by voluntary transfer has formed, in every country, an important branch of jurisprudence. At the present day the mode of alienation has been much simplified, but, universally, a deed is required for the conveyance of real estate. In works on real property the subject of deeds is only incidentally considered, such works being necessarily general in their character. Sir Edward Sugden, in England, and others in our own country, have rendered the profession valuable aid by the preparation of treatises devoted to the contract of sale, the law of vendor and purchaser. I have taken up for consideration the deed itself, by which the title in fee is conveyed. Only in an incidental way have I adverted to the law of vendor and purchaser. A glance at the table of cases will show how frequently questions relating to deeds have come before the courts, and it is believed that a treatise devoted exclusively to this subject will be gladly welcomed by the profession, although some of its parts are considered in other books.

It was not my original intention to treat of anything but the law governing the voluntary alienation of real property. I concluded, however, that the value of the treatise would be enhanced by the addition of chapters on tax deeds and deeds of sheriffs and constables, and have added chapters treating of these subjects, so far as they can be said to be a part of the law of deeds.

I believe that a law-book, to be adapted to practical use, ought to be written with several different objects in view.

It ought, in the first place, to be a treatise, in the strict sense of the word, in which legal principles are announced and explained. Where a divergence of opinion prevails among different courts, the author ought to endeavor to find the fundamental principle by which they may be harmonized, or failing in that, ought to state what, after a careful examination of the divergent authorities, he considers to be the correct rule. If he has done his work faithfully, his view, writing as he does from an impartial standpoint, should not be altogether valueless.

The work should state, also, what the courts have decided. For, however illogical the conclusion reached by a particular court may be, the rule announced has the force of law in the State in which the decision is pronounced. There can seldom be, in actual practice, much dispute over well-settled propositions. The difficulty which besets a court in the decision of a controversy, or a practitioner in giving counsel, is the application of a principle to a state of facts. Hence, a text-book should not only state bare legal propositions, but should illustrate them with instances in which they have been applied.

Then, again, the multiplicity of reports, and the difficulty, save in large cities, of gaining access to them all, should induce an author to lay before his reader, whenever the importance of the principle under discussion is sufficient to warrant it, that part of the language of the court pertinent to the point considered, not only as an aid to the busy lawyer, but also as a means by which the writer's conclusions may be verified.

On this plan, I have written this treatise. I have endeavored to state legal principles, to illustrate them with apt cases, and finally, in proper instances, to furnish the reader with the words in which the courts have declared the law. While endeavoring to lay before the reader the law, as decided by the courts, I have frequently, in attempting to discover the correct rule, commented upon conflicting decisions. But such matter has generally been

placed in a section by itself, so that my own views and conclusions may not be taken as giving the effect of the decisions of the courts. In cases of contrariety of decision I have endeavored to state correctly both views, in order that if my own opinion may not be acceptable, the authorities sustaining an opposite view may be consulted.

An author has considerable difficulty in determining how far his researches should go in the multiplication of authorities. I have sought to state fully the leading principles of the law of deeds, with their exceptions and qualifications, and have supported them with an abundance of authority. Many cases I have purposely omitted, and some, undoubtedly, have escaped my observation. Perhaps I have erred, in some instances, in citing in support of generally accepted propositions more cases than necessity would require. But as the book is intended for use in every part of the United States, it seemed desirable that it should contain a collection of cases from the different States. If the number be large, many of them will at least serve the purpose of illustrating, in various ways, the principles in support of which they are cited.

Though no formal division has been made, the work consists of ten parts: Part first, embracing chapters one to six, is devoted to a consideration of the general requisites of deeds, including, with an introductory chapter, such matters as the various kinds of conveyances, what must pass by deed, the parties to a deed, the necessity of a writing for the conveyance of real estate, and the doctrine of part performance. Part second, consisting of chapter seven, is taken up with a consideration of the formal parts of the deed, treating of such matters as the form of the deed generally, the date, the name and description of the parties, the granting words, the *habendum*, *reddendum*, and *testimonium* clauses. The execution of the deed constitutes part third, consisting of chapters eight to thirteen, in which part attention is given to the reading, signature, seal, and attestation of the deed, and its delivery, either absolutely or in escrow. In part fourth,

consisting of chapters fourteen to eighteen, the question of the execution of deeds in certain relations is considered, taking up the subject of the execution of deeds by private and municipal corporations, execution of deeds under powers of attorney, under powers of sale in trust deeds and mortgages, execution of deeds by trustees for sale, and lastly, the subject of alterations, and filling up blanks. Having now an executed deed, part fifth, including chapters nineteen to twenty-two, is devoted to a treatment of the law of acknowledgment and registration, and the notice supplied by the record. This concludes the first volume. Part sixth, consisting of chapter twenty-three, contains a statement of the law of notice, in general, by possession, agency, and *lis pendens*. Part seventh, chapter twenty-four, treats of the subject of the consideration, and the various rules connected with it. In part eighth, the construction of deeds is considered. This part, consisting of chapters twenty-five to thirty, includes the general principles of construction, the law of community property as applicable to deeds, the law of covenants, conditions, limitations, reservations, exceptions, restrictions, stipulations, recitals, and description, and of a deed subject to a mortgage. Part ninth, including chapters thirty-one to thirty-seven, treats of the effect of deeds, or of the transactions resulting in deeds, embracing such matters as, whether a deed absolute in form is a mortgage or not, the effect of a deed where the grantee does not pay the purchase money, the effect of the deed in conveying fixtures, the vendor's lien, and the effect of the deed by way of estoppel and merger. This concludes the subject of voluntary transfer, and the tenth part, consisting of chapters thirty-eight and thirty-nine, is devoted to a consideration of deeds made under authority of law, tax deeds, and sheriff's deeds.

Requiring years for its preparation, and covering a wide field, the work must have many imperfections, and I shall be very happy to receive any suggestions of inaccuracies or omissions that may be observed. If it shall

do naught toward giving a clearer conception of the law on the important subject of transferring title to real estate, yet in the hope that it may assist both bench and bar by its arrangement and citation of authorities, and by showing where the law may be found, it is submitted to the profession.

ROBERT T. DEVLIN.

SACRAMENTO, April, 1887.

CONTENTS.

CHAPTER I.

INTRODUCTORY CHAPTER.

- § 1. Introductory.
- § 2. Historical view.
- § 3. Statute of quia emptores.
- § 4. Statute of frauds.

CHAPTER II.

DEFINITIONS AND DIFFERENT KINDS OF DEEDS.

- § 5. What is a deed—Definitions.
- § 6. Agreement for a deed.
- § 7. Same continued.
- § 8. Illustrations.
- § 9. Classification of deeds at common law.
- § 10. Feoffment.
- § 11. Gift.
- § 12. Grant.
- § 13. Lease.
- § 14. Exchange.
- § 15. Partition.
- § 16. Release.
- § 17. Confirmation.
- § 18. Void deeds.
- § 19. Surrender.
- § 20. Assignment.
- § 21. Defeasance.
- § 22. Deeds under statute of uses.
- § 23. Bargain and sale deeds.
- § 24. Covenant to stand seised to uses.
- § 25. Lease and release.
- § 26. Fine and recovery.
- § 27. Quitclaim deeds.

- § 113. Right of seisin.
- § 114. Power of corporations to convey.
- § 115. Restriction from nature of corporations.

PART II.

WHO MAY TAKE BY DEED.

- § 116. The capacity of the grantee.
- § 117. Deeds to husband and wife—Common law—New York.
- § 118. Other States.
- § 119. Husband's name inserted by mistake.
- § 120. Deeds to corporations.
- § 120a. Deed to trustees of an unincorporated association.
- § 121. Question between State and corporation.
- § 122. Corporation acting in other States.
- § 123. The parties must be *in esse* at the time the conveyance is executed.

CHAPTER V.

ALIENS TAKING BY DEED.

- § 124. Purchase by aliens.
- § 125. Office found.
- § 126. In England.
- § 127. In the United States.
- § 128. State regulation.
- § 129. Treaty paramount law.
- § 130. Resident aliens.
- § 131. Deed of alien before office found.
- § 132. Naturalization.

CHAPTER VI.

NECESSITY OF A WRITING—PART PERFORMANCE.

- § 133. Deeds must be written upon paper or parchment.
- § 134. Comments.
- § 135. Printed deeds.
- § 136. Whether writing with ink is necessary.
- § 137. Parol contracts may be enforced in case of part performance.
- § 138. Where this doctrine does not prevail.
- § 139. The basis upon which the principle rests.
- § 140. Part performance must have been done by the party seeking the enforcement of the contract.
- § 141. Acts must be done in pursuance of the agreement.
- § 142. Convincing proof required.
- § 143. Letter as memorandum of contract.

- § 144. Part performance of an agreement for several acts.
- § 145. Rule with reference to the taking of possession.
- § 146. Possession must be in pursuance of agreement.
- § 147. Relief when possession taken based upon equitable considerations.
- § 148. Parol gift of land.
- § 149. Compensation at law the test.
- § 150. What is a sufficient possession.
- § 151. Possession alone.
- § 152. Fraudulent omission of part of land from deed.
- § 153. Length of time over which possession extends.
- § 154. Character of possession.
- § 155. Possession contemporaneous with contracts.
- § 156. Possession must be in pursuance of the agreement—*Pre-existing tenancy*.
- § 157. Possession upon parol partition.
- § 158. Disputed boundaries.
- § 159. Parol exchange.
- § 160. Erection of improvements.
- § 161. Nature of improvements.
- § 162. Compensation for improvements.
- § 163. Benefit from the use of the land—*Comments*.
- § 164. One view.
- § 165. Opposite view.
- § 166. *Comments*.
- § 167. Parol contract for conveyance of land between parent and child.
- § 168. Consideration.
- § 169. Acts not considered part performance.
- § 170. Payment of money merely is not part performance.
- § 171. Reasons for the rule.
- § 172. When payment of money part performance.
- § 173. Part performance by marriage.

CHAPTER VII.

THE FORMAL PARTS OF THE DEED.

PART I.

FORM OF THE DEED GENERALLY.

- § 174. Form of the deed, generally.
- § 175. Statutory forms.
- § 176. Enumeration of the formal parts.

PART II.

THE DATE OF THE DEED.

- § 177. Date not necessary to the validity of a deed.
- § 178. Presumption of delivery at date.

- § 179. Different view—Presumption of delivery from acknowledgment.
- § 180. Comments.
- § 181. Language of the courts.
- § 182. Presumption not conclusive.

PART III.

NAMES AND DESCRIPTIONS OF THE PARTIES.

- § 183. Objects to be attained in naming the parties.
- § 183a. Identity of name.
- § 184. Designation of grantee by description.
- § 185. Use of common name.
- § 186. Uncertainty of grantee.
- § 187. Where the grantee is dead.
- § 188. Signature by wrong name.
- § 189. Description sufficient if no uncertainty.
- § 190. The grantee named must be capable of holding.
- § 191. Fictitious grantee.
- § 192. Mistake in name of corporation.
- § 193. Extrinsic testimony to remedy uncertainty.
- § 194. Necessity for stating name of grantor in deed.
- § 195. Rule in New Hampshire that signature alone is sufficient.
- § 196. Rule in United States courts that party not bound unless named in the deed.
- § 197. Same rule in Massachusetts.
- § 198. Same rule in Maine.
- § 199. In Ohio.
- § 200. In Alabama.
- § 201. In Indiana.
- § 201a. In Texas.
- § 202. In Mississippi.
- § 203. In California.
- § 204. Comments.
- § 205. Christian name.
- § 206. Mistake in Christian name.
- § 207. Designation "junior."
- § 208. Deeds to partners.
- § 209. Ascertaining intended grantee.
- § 210. Further description of the parties.

PART IV.

THE GRANTING WORDS.

- § 211. An intention to convey should be shown.
- § 212. Nature of the deed.

PART V.

THE HABENDUM.

- § 213. The habendum not an essential part of a deed.
- § 214. Repugnance between granting words and habendum.
- § 215. Qualification of previous grant.
- § 215a. Where habendum controls.
- § 216. Not the province of habendum to introduce new subject-matter into the grant.
- § 217. Reference to habendum.
- § 218. Explanatory clause.
- § 219. Party not named as grantee taking under habendum.
- § 220. Effect of the habendum to limit the estate.

PART VI.

THE REDDENDUM.

- § 221. What is, and when used.
- § 222. What is necessary for a good reddendum.

PART VII.

THE TESTIMONIUM CLAUSE.

- § 223. General use of the testimonium.
- § 224. Relinquishment of the right of dower.

CHAPTER VIII.

READING THE DEED.

- § 225. How far reading is essential.
- § 226. Duty of officer.
- § 227. Deaf and dumb person.
- § 228. Where person does not understand English.
- § 228a. Considering deed not read a forgery.
- § 229. Burden of proof.
- § 230. Effect of erroneous reading.

CHAPTER IX.

THE SIGNATURE.

- § 231. Signing unnecessary at common law.
- § 232. Signing in grantor's presence.
- § 233. Reason for this rule.

- § 234. Opposition to this rule.
- § 235. Absence of grantor.
- § 236. Holding top of pen.
- § 237. Signature by mark.
- § 237a. Grantor's name written by grantee.
- § 238. Attestation by witness.
- § 239. Comments.
- § 240. Variance in name.
- § 241. Deed inter partes.

CHAPTER X.

THE SEAL.

- § 242. History of the use of seals.
- § 243. Definition.
- § 244. Seal stamped upon paper.
- § 245. Seal essential at common law.
- § 246. In equity.
- § 247. Seal required unless dispensed with by statute.
- § 248. Abolition of distinction between sealed and unsealed instruments.
- § 249. Effect of these statutes.
- § 249a. Such statutes not retroactive.
- § 250. Use of scrolls.
- § 251. Rule in Delaware, Indiana, Iowa, Louisiana, Missouri, and Virginia.
- § 252. In Mississippi.
- § 253. In Tennessee.
- § 254. Several persons may bind themselves by one seal.

CHAPTER XI.

ATTESTING WITNESSES.

- § 255. Attesting witnesses not necessary at common law.
- § 256. Witnesses required in different States.
- § 257. Attestation must be made at grantor's request.
- § 258. Import of term.
- § 259. Qualification of the witnesses.

CHAPTER XII.

DELIVERY OF DEEDS.

- § 260. Delivery essential.
- § 261. No particular form required.
- § 262. Delivery a question of intention.

- § 263. Evidence of intention.
- § 264. When deed takes effect.
- § 265. Presumption as to time of delivery.
- § 266. Verbal admissions.
- § 267. Possession of deeds surreptitiously obtained.
- § 268. Ratification of deed so obtained.
- § 268a. Manner of ratification.
- § 269. Manual delivery not requisite.
- § 270. Delivery of commissioner's deed.
- § 271. Delivery for inspection.
- § 272. Delivery to director of corporation.
- § 273. Deed delivered for examination, whether a contract of purchase.
- § 273a. Canceling instructions for delivery.
- § 273b. Offer to comply with terms of delivery.
- § 273c. Undelivered deed in connection with other evidence.
- § 274. Delivery to officer taking acknowledgment.
- § 275. Delivery to another for the grantee's use.
- § 275a. Death of grantor before actual delivery to grantee.
- § 276. Assent of grantee subsequent to delivery.
- § 277. Where there are several grantors.
- § 278. Constructive delivery.
- § 279. Delivery after death of grantor.
- § 279a. Some illustrations.
- § 280. Absolute delivery to a third person to hold until grantor's death.
- § 281. Instances.
- § 281a. Grantor's acts and declarations after delivery.
- § 282. Delivery with a right to recall the deed.
- § 283. This rule not universally adopted.
- § 283a. Creditors not injured by undelivered deed.
- § 284. Saving expenses of administration.
- § 284a. Formal expression of grantor.
- § 285. Acceptance by the grantee.
- § 286. Presumption of acceptance in favor of infants.
- § 287. Presumption of acceptance by adults.
- § 288. Contrary views.
- § 289. What is the proper rule—Comments.
- § 290. Registration not of itself delivery.
- § 291. Delivery to recording officer for use of grantee.
- § 292. Registration prima facie evidence of delivery.
- § 293. Where acceptance of deed depends upon conditions, registration is not prima facie evidence of delivery.
- § 293a. Deed executed in payment of a debt.
- § 294. Possession of deed by grantee, presumption of delivery.
- § 295. Parol evidence admissible to rebut presumption arising from possession of deed.
- § 296. Inference of delivery of deed from execution in presence of witnesses.

- § 297. Inference of acceptance from relationship between person receiving deed and grantee.
- § 297a. Estoppel of grantor.
- § 298. Delivery to several grantees.
- § 299. Comments.
- § 300. Deed once executed and delivered cannot be revoked.
- § 301. Illustrations of foregoing rule.
- § 301a. Trustee of resulting trust.
- § 301b. Erasure of grantor's name.
- § 302. A different doctrine prevails in some of the States.
- § 303. Ground upon which these decisions are based.
- § 304. Redelivery without intention to revest title.
- § 305. Comments on these decisions.
- § 306. Redelivery to the grantor for correction, acknowledgment, etc.
- § 307. Delivery to a married woman.
- § 308. Whether delivery is a question of law or fact.
- § 309. Deed taking effect as a will.
- § 309a. Intention of maker in determining whether a deed or a will.
- § 310. Complete execution before delivery essential.
- § 311. Right to rents.

CHAPTER XIII.

DELIVERY IN ESCROW.

- § 312. Definition of an escrow.
- § 313. Deed must be executed—Delivery the only difference between deed and escrow.
- § 313a. Awaiting settlement of title to land.
- § 314. Delivery to the grantee cannot operate as an escrow.
- § 315. Conditional deed.
- § 316. Delivery to grantee's agent.
- § 317. Deed placed in grantee's hand for transmission to another.
- § 317a. Notice of deed in escrow.
- § 318. Some condition to be performed before delivery.
- § 319. Whether an escrow or a present deed.
- § 320. Materiality of distinction.
- § 321. Grantee must perform condition before entitled to delivery.
- § 322. Escrow delivered without authority or obtained fraudulently passes no title.
- § 323. Legal title until performance of condition is in grantor.
- § 324. Not an escrow if grantor retains the right of control.
- § 325. Voluntary conveyance.
- § 326. Comments.
- § 327. Enforcing delivery of deed.
- § 328. At what time title passes
- § 329. Intention of parties.

- § 330. Lien of attachment or judgment upon land prior to second delivery.
- § 331. The necessity of an actual second delivery.
- § 332. No particular form of delivery required.
- § 333. Condition must be one to be performed by grantee.
- § 333a. Delivery after grantor's death.
- § 333b. Death of party to action for specific performance.

CHAPTER XIV.

EXECUTION OF DEEDS BY CORPORATIONS.

PART I.

PRIVATE CORPORATIONS.

- § 334. Signature by corporations.
- § 335. What is sufficient recital of execution by corporation.
- § 336. Seal incident to corporation.
- § 337. What is a corporate seal.
- § 338. Who has the power to convey for the corporation.
- § 339. Compelling directors to execute deed against their judgment.
- § 340. Execution of deed in mode prescribed by law or charter.
- § 341. Who may affix the seal.
- § 342. Rule that power to execute deed must be by deed not applicable to corporations.
- § 343. Proof of the corporate seal.
- § 344. Delivery of deed of corporation.

PART II.

MUNICIPAL CORPORATIONS.

- § 345. Mode of alienation prescribed in charter must be observed.
- § 346. Effect of conditions in charter upon which alienation may be made.
- § 347. Restriction on alienation as affecting power to mortgage or lease.
- § 348. Presumption of regularity.
- § 348a. Right to convey before dedication to public use.
- § 349. Same rule applicable to municipality as to general government.
- § 350. Requisites and proof of deeds.
- § 351. Title cannot be conveyed by a simple ordinance or vote.

CHAPTER XV.

EXECUTION OF DEEDS UNDER POWERS OF ATTORNEY.

- § 352. Capacity to appoint an attorney.
- § 352a. Corporation acting as attorney.

- § 353. Powers of attorney by married women—Common-law rule.
- § 354. Common-law rule altered by statute.
- § 355. Delegation of authority.
- § 356. Authority to execute a deed must be by deed.
- § 356a. Notice of grantor's rights from act of attorney.
- § 357. Contract of sale.
- § 358. Construction of powers of attorney.
- § 358a. Situation of parties and subsequent ratification.
- § 358b. Agent for corporation.
- § 359. General terms limited by particular words.
- § 360. Illustrations of construction placed upon powers of attorney.
- § 361. Partition.
- § 362. Special instances of construction.
- § 363. Continued.
- § 363a. Implied authority of attorney.
- § 364. Warranty deed under power of attorney—Comments.
- § 365. Decisions that attorney has no power to execute warranty deed.
- § 366. Cases holding attorney has such power.
- § 367. Mr. Rawle's views.
- § 368. Comments.
- § 369. Description of property to be sold.
- § 370. Power to sell imports sale for cash.
- § 371. Sale on credit must be reasonable credit.
- § 372. Power to sell does not authorize gift.
- § 372a. Agent cannot sell to pay his own debts.
- § 373. Exchange not authorized by power to sell.
- § 374. Discretion of attorney whether land is to be used for specified purposes.
- § 374a. Power of attorney to lay out ways.
- § 375. Revocation.
- § 376. Effect of sale by principal upon attorney's commissions.
- § 377. Execution of deeds by attorneys in fact.
- § 378. Relaxation of this strictness.
- § 379. Proper mode of signature.
- § 380. Comments.
- § 381. Some illustrations.
- § 381a. Conveying individual interest where power is given by several.
- § 381b. Execution of a power by a partnership.

CHAPTER XVI.

DEEDS UNDER POWERS OF SALE IN TRUST DEEDS AND MORTGAGES.

- § 382. Powers of sale in trust deeds and mortgages.

- § 383. Power of sale irrevocable
- § 384. Subsequent disabilities.
- § 385. Effect of death upon power of sale.
- § 386. Rule in Texas.
- § 386a. Liability of trustee.
- § 387. Appointment of new trustee.
- § 388. Power of sale a cumulative remedy.
- § 389. Provisions for sale.
- § 390. Effect of tender upon sale.
- § 391. Rule in Massachusetts.
- § 392. Sale by joint trustees.
- § 393. Sale under unrecorded mortgage.
- § 394. Statutory regulations.
- § 395. Power of sale passing by assignment of mortgage.
- § 396. Sale by administrator of mortgagee.
- § 397. Conveyance of part of the premises.
- § 398. Compliance with the conditions of the power.
- § 399. What notice must be given.
- § 399a. Personal notice to grantor or subsequent encumbrancers.
- § 400. Publication of notice in newspaper.
- § 401. Extent of circulation.
- § 402. Time of publication.
- § 403. A matter of contract.
- § 404. Publication by posting notices.
- § 405. Authority for the sale.
- § 406. Designation of place of sale.
- § 407. Designation of time of sale.
- § 407a. Deed silent as to place of sale.
- § 408. Erroneous statements.
- § 408a. Sale under second deed erroneously referring to prior deed.
- § 409. Description of the property.
- § 410. Sales to bona fide purchasers.
- § 411. Sale should be beneficial to debtor.
- § 412. Sale for cash.
- § 413. Trustee's presence at sale.
- § 414. Power to adjourn sale.
- § 415. Release of parcel from mortgage.
- § 416. Requirement of deposit.
- § 417. Right of mortgagee to purchase.
- § 418. Sale voidable only.
- § 419. Waiver.
- § 420. Mortgagee may execute a deed to himself.
- § 421. By whom the deed should be made.
- § 422. Deed to a person other than purchaser.
- § 423. Reference in deed to power.
- § 424. Death of purchaser.
- § 425. Recitals in deed.
- § 426. Growing crops.
- § 427. Sale before default in trust deed passes legal title.

- § 428. Setting aside sale.
- § 429. Agreements between mortgagor and mortgagee.
- § 430. Enjoining sale.

CHAPTER XVII.

DEEDS BY TRUSTEES FOR SALE.

- § 431. Nature of powers to sell.
- § 432. How created.
- § 433. Trustees cannot delegate power of sale.
- § 434. Married woman as trustee.
- § 435. Services of agent.
- § 436. What a power of sale authorizes.
- § 437. Improvident sale.
- § 438. Effect of trustee's deed.
- § 439. Termination of power by lapse of time.
- § 439a. Execution of deed without referring to power.
- § 440. How the sale may be made.
- § 441. Private sale or auction.
- § 442. Sale to the highest bidder.
- § 443. What notice to be given.
- § 444. Compliance with terms of power.
- § 445. Notice from recital of consideration.
- § 446. Construction of powers of sale.
- § 446a. Intention to govern in construction.
- § 447. Construction against trustee.
- § 448. Sale within specified time.
- § 448a. Exercise of power of sale after accomplishment of purpose of sale.
- § 449. Provision in deed requiring consent.
- § 450. Deed with assent of cestui que trust.
- § 451. Declaration of trust.
- § 452. Power to sell upon a contingency.
- § 453. Trust deed becoming void on happening of contingency.
- § 454. Conduct of the sale.
- § 455. Who should execute the deed.

CHAPTER XVIII.

FILLING UP BLANKS—ALTERATIONS, ETC.

- § 456. Filling up blanks.
- § 456a. When deed is void and when not.
- § 457. Parol authority to insert name.
- § 458. Grantor may be estopped.

- § 459. Party executing deed bound.
- § 460. Alteration of deeds.
- § 461. Alteration by a stranger.
- § 461a. Grantee's title not divested.
- § 462. Material alteration.
- § 462a. Redelivery of altered deed.
- § 463. Burden of proof.

CHAPTER XIX.

ACKNOWLEDGMENT OF DEEDS.

- § 464. Acknowledgment of deeds.
- § 465. Acknowledgment not necessary between the parties.
- § 465a. Estoppel to deny signature.
- § 466. Statutory provisions.
- § 467. Admissibility of acknowledged deed in evidence.
- § 468. By whom the acknowledgment should be made.
- § 469. Time within which deed may be acknowledged.
- § 470. Qualification of officers.
- § 471. Acknowledgment before an officer de facto.
- § 471a. Certificate authenticating acknowledgment taken out of state.
- § 471b. Same subject, continued.
- § 472. Temporary appointment.
- § 473. Acknowledgment before deputy.
- § 474. Deputy taking acknowledgment in his own name.
- § 475. Presumption as to appointment of deputy.
- § 476. Officer cannot take acknowledgment of deed in which he is interested.
- § 477. Where the officer taking the acknowledgment is a trustee.
- § 477a. Degree of interest.
- § 478. Effect of taking acknowledgment by party.
- § 479. Length of acquaintance with person making acknowledgment.
- § 480. Comments on this rule.
- § 481. Omission of date does not invalidate acknowledgment.
- § 482. Omission to state place of taking acknowledgment.
- § 483. When certificate does not show in what State acknowledgment was made.
- § 484. Proof of locality in which officer had jurisdiction.
- § 484a. Stating name of county.
- § 485. Treating two certificates as one.
- § 486. Presumption that acknowledgment was taken within jurisdiction of officer.
- § 487. Jurisdiction of office.
- § 488. Comments.
- § 489. Officer if required by statute must attach seal.
- § 490. Where there is no statutory provision.
- § 491. Reference to official seal.

- § 492. Same subject—Contrary decision.
- § 493. Comments.
- § 494. Use of private seal.
- § 495. What will constitute an official seal.
- § 495a. Officer using another's seal.
- § 496. Signature of officer must be attached to certificate.
- § 497. Certificate of foreign officer, prima facie evidence of conformity to law.
- § 498. Taking an acknowledgment is ministerial act.
- § 499. Official character of officer should appear.
- § 500. Certificate prima facie evidence.
- § 501. Abbreviations sufficient designation of official character.
- § 502. Proof aliunde of official character.
- § 503. Stating name of grantor in certificate.
- § 504. Certificate sufficient, if it shows grantor's name by reference.
- § 505. Presumption that parties use their real names.
- § 506. Acknowledgment in court.
- § 507. Acknowledgment by trustee.
- § 508. Certificate should affirmatively show compliance with statute.
- § 509. Facts showing compliance with statute must be stated.
- § 510. Equivalent words to those mentioned in statute.
- § 511. Illustrations.
- § 512. Omission of the word "personally."
- § 513. Surplusage does not vitiate certificate.
- § 514. Clerical mistakes in certificate.
- § 515. Other illustrations.
- § 516. Omission to state immaterial facts.
- § 517. Comments.
- § 518. Fact must appear that grantor was known to officer or his identity established.
- § 519. Statement that officer is satisfied with identity insufficient.
- § 520. In some States, officer not required to certify to personal identity.
- § 521. Fact of acknowledgment must appear.
- § 522. Equivalent words indicating acknowledgment.
- § 523. Omission of the word "voluntary."
- § 524. Omission of certain words under particular statutes.
- § 525. Presuming an acknowledgment.
- § 526. Comments.
- § 527. Certifying an acknowledgment on same paper on which deed is printed or written.
- § 528. Officer cannot impeach his own certificate.
- § 529. Between the parties the acknowledgment may be impeached for fraud.
- § 529a. Taking acknowledgment through telephone.
- § 530. Grantee must have knowledge of fraud or of facts sufficient to put him on inquiry.
- § 531. To overcome the certificate the evidence must be clear and convincing.

- § 532. Evidence.
- § 533. Illustrations.
- § 533a. Further consideration of this subject.
- § 533b. In some cases considered prima facie evidence only.
- § 534. Comments.
- § 535. Innocent grantee protected.
- § 536. Omission of essential word not cured by insertion in record.
- § 537. Acknowledgment through interpreter.
- § 538. Comments.
- § 539. Amendment of certificate—Decisions that such power exists.
- § 540. In Mississippi.
- § 541. In Missouri.
- § 541a. In Texas.
- § 542. Decisions that such power does not exist.
- § 543. In Illinois.
- § 544. In Virginia.
- § 545. In the Supreme Court of the United States.
- § 546. Comments.
- § 547. Proof by subscribing witness.

CHAPTER XX.

ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN.

- § 548. Acknowledgment an essential part of the deed.
- § 548a. Modern legislation.
- § 548b. Deed defectively acknowledged not an estoppel.
- § 549. The law in California.
- § 550. Comments.
- § 551. Separate examination of wife.
- § 552. Examination private if husband is excluded.
- § 553. Comments.
- § 554. Husband hearing examination.
- § 555. Construction of particular certificates.
- § 556. Presumption of private examination.
- § 557. Comments.
- § 558. Identity should appear.
- § 559. Statement of wish not to retract.
- § 560. Explanation of contents of deed
- § 560a. Explanation to widow.
- § 561. Explanation in presence of husband.
- § 561a. Explanation of title.
- § 562. Where officer himself not required to explain.
- § 563. Omission of explanation.
- § 563a. Presumption of knowledge.
- § 564. Acknowledgment by deaf mutes.
- § 565. Execution voluntary.
- § 566. Equivalent words for voluntary act—Comments.
- § 567. Instances.

- § 568. Omission of the word "fear"—Conflicting decisions.
- § 569. Comments.
- § 569a. Unacknowledged contract to convey land.
- § 570. Other cases in which certificates have been construed.
- § 571. Substantial compliance with the statute sufficient.
- § 572. Surplusage.
- § 573. Community property.
- § 574. Married woman acting as feme sole.
- § 575. Comments.

CHAPTER XXI.

REGISTRY LAWS OF THE SEVERAL STATES.

- § 576. Statutory provisions.
- § 577. Alabama.
- § 578. Arizona.
- § 579. Arkansas.
- § 580. California.
- § 581. Colorado.
- § 582. Connecticut.
- § 583. Dakota, North and South.
- § 584. Delaware.
- § 585. District of Columbia.
- § 586. Florida.
- § 587. Georgia.
- § 588. Idaho.
- § 589. Illinois.
- § 590. Indiana.
- § 591. Iowa.
- § 592. Kansas.
- § 593. Kentucky.
- § 594. Louisiana.
- § 595. Maine.
- § 596. Maryland.
- § 597. Massachusetts.
- § 598. Michigan.
- § 599. Minnesota.
- § 600. Mississippi.
- § 601. Missouri.
- § 602. Montana.
- § 603. Nebraska.
- § 604. Nevada.
- § 605. New Hampshire.
- § 606. New Jersey.
- § 607. New Mexico Territory.
- § 608. New York.
- § 609. North Carolina.
- § 609a. North Carolina.

- § 610. Ohio.
- § 611. Oregon.
- § 612. Pennsylvania.
- § 613. Rhode Island.
- § 614. South Carolina.
- § 614a. South Dakota.
- § 615. Tennessee.
- § 616. Texas.
- § 617. Utah.
- § 618. Vermont.
- § 619. Virginia.
- § 620. Washington.
- § 621. West Virginia.
- § 622. Wisconsin.
- § 623. Wyoming.
- § 624. Effect of statutes giving time to record deed—Valid from delivery.
- § 625. Protection of grantee.

CHAPTER XXII.

REGISTRATION OF DEEDS.

- § 626. In general.
- § 627. In England.
- § 628. Registration in the United States.
- § 629. Registration not necessary between the parties.
- § 630. Registration of mortgages in book of deeds.
- § 631. Mortgagee considered a purchaser.
- § 632. Pre-existing debt.
- § 633. Assignee of mortgage considered a purchaser.
- § 634. Judgment creditors.
- § 635. In some States judgment creditor considered within the registry acts.
- § 636. Actual notice subsequent to the lien in these States.
- § 637. Purchasers at execution sale.
- § 638. Purchasers at such sale with notice.
- § 639. Rights of judgment creditor as purchaser—Comments.
- § 640. General rule—Judgment creditor is not bona fide purchaser.
- § 641. Contrary rule in Iowa.
- § 641a. In other States.
- § 642. Comments.
- § 643. Mortgage for purchase money.
- § 643a. Third person advancing money.
- § 643b. Execution at same time not essential.
- § 644. Administrator's deed and prior unrecorded conveyance.
- § 645. Compliance with preliminary requirements.
- § 646. Illustrations—Attesting witnesses.
- § 646a. Statutes requiring payment of taxes prior to registration.
- § 646b. Such statutes held to be constitutional.
- § 646c. Comments.

- § 647. Attachment at time of acknowledgment.
- § 648. Incapacity to take acknowledgment.
- § 649. Omission of name of grantee.
- § 650. Description of land.
- § 651. Illustrations of description insufficient to give constructive notice.
- § 652. Illustrations where purchaser bound, though description inaccurate.
- § 653. Description by impossible sectional number.
- § 654. Distinction between description in deed and in mortgage.
- § 655. Comments.
- § 656. Instruments not entitled to registration.
- § 657. Illustrations.
- § 658. Want of delivery.
- § 659. Equitable mortgages.
- § 660. Assignment of mortgage.
- § 661. In some States, defective deeds if recorded impart notice.
- § 662. In Kansas.
- § 663. Registration in wrong county.
- § 664. Land in two counties.
- § 665. Registration of copy of deed in proper county.
- § 666. Certified copy of deed recorded in wrong county as evidence.
- § 667. Presumption of actual notice from examination of records.
- § 668. Comments.
- § 669. Change of boundaries of county.
- § 670. Purchaser under quitclaim deed—Comments.
- § 671. View that such purchaser is not entitled to the protection of the registry acts.
- § 672. View that such purchaser is entitled to the full protection of the registry laws.
- § 673. Comments.
- § 674. Intention in quitclaim deed to pass grantor's interest only.
- § 675. Another illustration.
- § 676. Reservation in quitclaim deed as affecting prior void or voidable deed.
- § 677. Record partly printed.
- § 678. Interest of recording officer.
- § 679. Time at which deed is held to be recorded.
- § 680. Mistake of copying deed in record—Conflicting views—Comments.
- § 681. View that grantee is not affected by mistake in copying deed.
- § 682. Reasonable precaution.
- § 683. Contrary view that purchaser is bound by what appears upon record.
- § 684. Fuller presentation of this view.
- § 685. Views of Mr. Pomeroy.
- § 686. Comments.
- § 687. Effect of mistake in copying deed when considered recorded as soon as filed.

- § 688. Effect of mistake where opposite view prevails.
- § 689. Continued.
- § 690. Destruction of record.
- § 691. Proof of deed where record is destroyed.
- § 692. Index as part of the record—Comments.
- § 693. View that deed improperly indexed does not give constructive notice.
- § 694. Decisions in Iowa on this question.
- § 695. View that mistake in index has no effect upon record.
- § 696. Comments.
- § 697. Liability of recording officer for error.
- § 698. Correction of mistake in record.
- § 699. Reformation of deed—Correcting record.
- § 700. Copy of seal.
- § 701. Filing deed with person in charge of office.
- § 702. Comments.
- § 703. Registration of deeds when State is in rebellion.
- § 704. Payment of fees.
- § 705. Proof of time at which deed is recorded.
- § 706. Withdrawing deed filed for record.
- § 707. Constructive notice.
- § 708. Deposit subject to further order.
- § 709. Priority between deeds recorded on same day.
- § 710. Facts of which the record gives notice.
- § 710a. Presumption of knowledge of rights of others.
- § 711. Notice of unrecorded deed from notice of power of sale.
- § 712. Record is not notice to prior parties.
- § 713. Record is notice only to purchasers under the same grantor.
- § 714. Illustrations.
- § 715. Record of deed subsequent to mortgage not notice to mortgagee.
- § 716. Subsequent purchaser should notify mortgagee.
- § 717. Actual notice.
- § 718. Notice of unrecorded deed.
- § 719. Unrecorded deed and recorded purchase money mortgage.
- § 720. Comments.
- § 721. Subsequently acquired title inuring to benefit of grantee.
- § 722. Comments.
- § 723. How far back purchaser must search.
- § 724. Correct rule.

CHAPTER XXIII.

THE DOCTRINE OF NOTICE.

PART I.

THE GENERAL RULES OF NOTICE.

- § 725. In general.
- § 726. Forged deeds.

- § 727. Notice and knowledge
- § 728. Kinds of notice.
- § 729. Rumors.
- § 730. Same subject continued—Illustrations.
- § 731. Partnership property.
- § 731a. Information imparted to purchaser that title is in one partner.
- § 732. Information must be from credible source.
- § 733. Inadequacy of price.
- § 734. Statement from holder of adverse title.
- § 735. Information given by recorder.
- § 736. Time of payment of consideration.
- § 737. Intimate relationship or business connections.
- § 738. Notice of a trust.
- § 738a. Designation of grantee as trustee.
- § 739. Structures upon the land.
- § 740. Searching the record not alone sufficient.
- § 741. Further inquiry.
- § 742. Contradiction of information.
- § 743. What is due inquiry.
- § 744. Third persons.
- § 745. Presumption may be rebutted.
- § 746. Second purchaser without notice.
- § 747. Second purchaser with notice from bona fide purchaser.
- § 748. Former owner with notice.
- § 749. Tenant in common without notice.
- § 750. Notice of intention to execute a deed.
- § 751. Fraud.
- § 752. Negligence.
- § 753. Notice of right of way from ordinance.
- § 754. Laying down sidewalk.
- § 755. Deed from surviving widow.
- § 756. Notice of lien.
- § 757. Exception of encumbrance in covenant.
- § 758. Deed modified by annexed schedule.
- § 759. Notice from title deeds not between parties.

PART II.

POSSESSION.

- § 760. Possession as notice.
- § 761. Possession by grantor—Comments.
- § 762. View that possession is notice of grantor's rights.
- § 763. Opposite view—Possession not notice of grantor's rights.
- § 764. Comments.
- § 765. Absolute deed and grantor's possession under unrecorded defeasance.
- § 766. Parol evidence to show grantor's right of possession.
- § 767. Absolute deed with mortgage for support.

- § 768. Residence of husband and wife.
- § 769. Character of possession.
- § 770. Possession under one kind of right as notice of other rights.
- § 771. Sign of real estate agent.
- § 772. Possession of church.
- § 773. Possession distinct.
- § 774. Possession continuous.
- § 775. Tenant's possession as notice of landlord's title.
- § 775a. Notice from clause of option to purchase in lease.
- § 776. Comments.
- § 777. An inference of fact.

PART III.

AGENCY.

- § 778. Notice to an agent.
- § 779. Matter material to the transaction.
- § 780. Agent for both parties.
- § 781. Fraud of agent.
- § 782. Notice to a partner.
- § 783. Consulting attorney.
- § 784. Notice to trustee.
- § 785. Agent to examine title.
- § 786. Advertisement of sale.
- § 787. Resale by vendor.

PART IV.

LIS PENDENS.

- § 788. Doctrine of lis pendens.
- § 789. Alienation void as against judgment.
- § 790. Subject continued.
- § 791. Grantee of party to partition suit.
- § 792. Purchaser from person not a party to suit.
- § 792a. Unrecorded deed.
- § 793. Cross-complaint.
- § 794. Principle applies also to actions at law.
- § 795. Actions of ejectment.
- § 796. Diligence in prosecution of suit.
- § 797. Continued.
- § 798. Reasonable diligence.
- § 799. Rule of lis pendens not favored.
- § 800. Effect of lis pendens on attorney's lien for fees.
- § 801. Suit must affect specific property.
- § 802. When lis pendens commences.
- § 803. Statutory lis pendens.
- § 804. Effect of these statutes.
- § 805. Actual notice.

CHAPTER XIXV.

CONSIDERATION.

- § 806. Kinds of consideration.
- § 807. Support.
- § 808. Marriage.
- § 808 a. Estoppel from representations in marriage negotiations.
- § 808 b. Parol evidence showing marriage to be consideration.
- § 808 c. Grantor's intention to defraud creditors where deed is made in consideration of marriage.
- § 809. Other valuable considerations.
- § 810. Deeds of bargain and sale and covenants to stand seised.
- § 811. Consideration of paying grantor's debts.
- § 812. Trust to distribute estate according to will.
- § 813. Valuable consideration as protection to bona fide purchasers.
- § 814. Adequacy of consideration.
- § 815. Antecedent debts as consideration.
- § 816. The other view.
- § 817. Presumption that deed states true consideration.
- § 818. Presumption as against strangers—Conflict in the decisions—Comments.
- § 819. Decisions that the rule applies to strangers.
- § 820. Decisions that the rule does not apply to strangers.
- § 821. Comments.
- § 822. Proof of real consideration.
- § 823. Action for purchase price.
- § 824. Quantity of land conveyed.
- § 825. Parol promise of grantee to convey other land.
- § 826. Verbal promise.
- § 827. Vesting of title.
- § 828. Retention of purchase money by grantee.
- § 829. Whether a gift or an advancement.
- § 830. Reason for the rule admitting parol evidence as to consideration.
- § 831. Parol agreement to execute devise.
- § 832. Community property.
- § 833. In North Carolina, acknowledgment is release.
- § 834. Showing absence of consideration to defeat deed.

CHAPTER XXV.

PRINCIPLES OF CONSTRUCTION.

PART I.

GENERAL PRINCIPLES.

- § 835. Prefatory section.
- § 836. Intention of parties.

- § 836 a. Unusual form of deed
- § 837. Technical terms.
- § 838. Expression of grantor's motive.
- § 838 a. Expressions limiting title conveyed.
- § 838 b. Subsequent clauses neither enlarging nor limiting grant.
- § 838 c. Further consideration--Execution sales.
- § 839. Surrounding circumstances.
- § 840. This is but one rule.
- § 841. Appearance at time of sale.
- § 842. Illustrations.
- § 843. Grammatical construction.
- § 844. Resort to punctuation.
- § 845. Construing deeds together.
- § 846. Rule in Shelley's case.
- § 847. Lawful issue.
- § 848. Construction against grantor.
- § 849. Divers estates.
- § 849 a. Deed of executor passing individual interest.
- § 850. Construction favorable to operation of deed.
- § 850a. Merger of contract to convey in deed.
- § 850b. Stipulation surviving deed.
- § 850c. Deed correcting prior deed.
- § 851. Contemporaneous exposition.
- § 852. Election of grantee.
- § 853. Passing present interest with other provisions to take effect upon death of grantor.
- § 854. No present interest passing.
- § 855. Tendency to uphold deed.
- § 855a. Deed or will--Some illustrations.
- § 855 b. Same subject--Further illustrations.
- § 855 c. When a will.
- § 856. Conveyance of estate not owned by grantor.
- § 857. Conveyance in fee with condition upon a right of possession in the grantors.
- § 858. Limited estates.
- § 859. Same subject--Continued.
- § 860. Conveyance to wife and children.
- § 861. Relation from re-execution of lost deed.
- § 862. Water power.
- § 863. Appurtenances and incidents.
- § 864. Construction of particular words.

PART II.

COMMUNITY PROPERTY.

- § 865. In what States exists.
- § 866. The civil law.
- § 867. In other countries.

- § 868. Presumption of community property.
- § 869. Grants from the government—Rule in Texas.
- § 870. In California and Louisiana.
- § 871. Land purchased by earnings of wife.
- § 872. Gift to husband or wife.
- § 872a. Subsequently acquired title passes.
- § 873. Voluntary gift in fraud of wife.
- § 874. Title acquired after voluntary separation.
- § 875. Gift in compensation for services.
- § 876. Rebuttal of presumption of community property.
- § 877. Presumption when deed is made to wife.
- § 878. The rule in Texas.
- § 879. Purchase on credit.
- § 880. Tortious possession and deed in consideration of surrender thereof.

CHAPTER XXVI.

COVENANTS.

- § 881. Covenants.
- § 882. Construction.
- § 883. How created.
- § 884. Covenants usually found in deeds.
- § 885. Covenant for seisin.
- § 886. Different rule.
- § 887. Covenant for seisin of indefeasible estate.
- § 888. By what the covenant of seisin is broken.
- § 889. Broken at once if grantor has no possession.
- § 890. By what the covenant is not broken.
- § 891. Seisin of grantee.
- § 892. Burden of proof.
- § 893. Covenant for right to convey.
- § 894. Damages for breach of covenants of seisin and right to convey.
- § 895. Proof of real consideration.
- § 896. Mitigation of damages.
- § 897. Knowledge of grantor's want of title.
- § 898. Value of land as measure of damages.
- § 899. Undisturbed possession of grantee.
- § 900. Partial breach.
- § 901. Treating partial breach as entire.
- § 902. Burden of proof on partial breach.
- § 903. Power to purchase title.
- § 904. Keeping public street open.
- § 905. Covenant against encumbrances.
- § 906. Encumbrance defined.
- § 907. What are considered encumbrances.

- § 908. Water rights.
- § 909. Right to use stairway in common.
- § 910. Public highways as encumbrances.
- § 911. Right of way for a railroad.
- § 912. Right to light.
- § 913. Purchaser's knowledge of encumbrance.
- § 914. Parol evidence to exclude encumbrance from covenant.
- § 915. Comments.
- § 916. Damages for breach of covenant against encumbrances.
- § 917. Special injury.
- § 918. Removal of encumbrance by purchase.
- § 919. Burden of proof.
- § 920. Where encumbrance cannot be removed.
- § 921. Covenant for quiet enjoyment.
- § 922. Not broken by wrongful acts of others.
- § 923. Exercise of right of eminent domain.
- § 924. Actual eviction.
- § 925. Purchaser has burden of proof if he yields to adverse title.
- § 926. Comments.
- § 927. Premises in possession of another.
- § 928. Purchase of paramount title.
- § 929. Redemption on tax sales.
- § 930. Covenant for further assurance.
- § 931. Covenant of warranty.
- § 932. Breach of covenant of warranty.
- § 933. Right of joint possession.
- § 934. Damages for breach of covenants of quiet enjoyment and of warranty.
- § 935. Notice to the covenantor of suit.
- § 936. Comments.
- § 937. Where no notice is given to the covenantor.
- § 938. Mortgagee entitled to benefit of covenant.
- § 939. Interest and counsel fees as damages.
- § 940. Covenants running with the land.
- § 940a. Grantee bound by acceptance of deed.
- § 941. Markethouse.
- § 942. Covenants not running with the land.
- § 942a. Covenant converted into lien.
- § 943. Change in character of neighborhood.
- § 944. Estoppel from covenants.
- § 945. The necessity for a covenant.
- § 946. Statutory regulation.
- § 947. Limitations on this rule.
- § 948. Estoppel of State.
- § 949. Acquisition of title by trustee.
- § 950. General covenant when grantor's interest only conveyed.
- § 951. Estoppel of grantee.
- § 952. What covenants will create an estoppel.
- § 953. Implied covenants.
- § 954. Restriction of covenants.

- § 955. Liability of covenantor.
- § 956. Covenant to pay mortgage.
- § 957. Failure of title.

CHAPTER XXVII.

CONDITIONS, LIMITATIONS, RESERVATIONS, EXCEPTIONS, RESTRICTIONS, AND STIPULATIONS.

- § 958. Distinction between conditions precedent and subsequent.
- § 959. Fee passes upon condition subsequent.
- § 960. Absolute deed with subsequent grant on condition.
- § 961. Subsequent impossibility.
- § 962. Prevention of performance of condition.
- § 963. Condition against sale of intoxicating liquors.
- § 963 a. Construction of clauses against sale of liquors.
- § 964. Conditions precedent.
- § 965. Restraint on alienation.
- § 966. Restraint upon partition by tenants in common.
- § 967. Condition against putting in windows.
- § 968. Use of buildings for certain purposes.
- § 968 a. Enforcing personal contract of grantor against grantee with notice.
- § 969. Who may take advantage of breach.
- § 970. Conditions subsequent strictly construed.
- § 971. Some instances of construction.
- § 972. Time for performance of condition.
- § 973. Clear proof of forfeiture.
- § 974. Distinction between conditions and limitations.
- § 975. Appraisement of improvements.
- § 975 a. Where the estate conveyed is less than the fee.
- § 976. Parol condition.
- § 977. Effect of restriction.
- § 978. Deed in consideration of certain agreements.
- § 979. Reservations and exceptions.
- § 980. Construing a reservation as an exception.
- § 980 a. Title founded on an exception.
- § 981. Reservation by tenant in common.
- § 982. Reservation to third person.
- § 983. Reservation of support in deed to trustees.
- § 984. Reservation of plants making them personal property.
- § 985. Right of way.
- § 985 a. Right to pass reserved merely.
- § 986. Maintenance of tollhouse
- § 987. Unincorporated town.
- § 988. Passageway.
- § 989. Construction in particular cases.

- § 990. Restrictions and stipulations.
- § 990 a. Offensive occupations.
- § 990 b. Building lines.
- § 990 c. Extension of room, window, or piazza.
- § 990 d. Bay windows.
- § 991. Removal of restriction.
- § 991 a. Reasonable construction.
- § 991 b. Public policy.
- § 991 c. Changed conditions of city.

CHAPTER XXVIII.

RECITALS.

- § 992. Kinds of recitals.
- § 993. Recital that grantee is a beneficiary.
- § 994. Recital as surplusage.
- § 995. History of title.
- § 996. Stranger to title.
- § 997. Parties bound by recitals.
- § 998. Recognition of title in another.
- § 999. General recitals.
- § 1000. Notice from recitals.
- § 1001. Illustrations.
- § 1002. Failure to read recitals.
- § 1003. Recitals in patents.
- § 1004. Presumption of satisfaction of vendor's lien.
- § 1005. Indefinite description.
- § 1006. Collateral circumstances.
- § 1007. Notice of trust in favor of grantee.
- § 1008. Bond for deed.
- § 1009. Recital of nominal consideration as evidence of fraud of trustee.

CHAPTER XXIX.

DESCRIPTION.

- § 1010. Certainty of description.
- § 1011. Illustrations of uncertainty.
- § 1012. What is a sufficient description.
- § 1013. Illustrations.
- § 1014. Land of reputed owner as boundary.
- § 1015. General description and unrecorded deed.
- § 1015 a. Situation and condition shown by parol evidence.
- § 1016. Surplusage.

- § 1017. Illustrations.
- § 1018. Subject continued.
- § 1019. Parcel of larger tract.
- § 1020. Reference to maps or other deeds.
- § 1020a. Conflict between map and survey.
- § 1021. Loss of plat.
- § 1022. Parol evidence as to plat.
- § 1023. Right to way.
- § 1024. Land bounded by non-navigable stream or highway.
- § 1025. Where contrary intention appears.
- § 1026. Land bounded by lake or pond.
- § 1026a. Effect of meander lines.
- § 1027. Estoppel from description of land as bounded by a street.
- § 1028. Navigable streams and tide waters.
- § 1028a. Reason for these rules.
- § 1028 b. Presumption overcome only by actual reservation.
- § 1029. Courses and distances controlled by monuments.
- § 1029a. Erroneous description in incident of title.
- § 1030. When courses and distances prevail.
- § 1031. Latent ambiguity as to monument intended.
- § 1031a. Supplying omissions.
- § 1032. Subsequent survey.
- § 1032a. Reliance on survey.
- § 1033. Conflict between starting point and other calls.
- § 1034. Running to line of another tract.
- § 1035. "Northerly," "due north", etc.
- § 1036. Division lines by consent.
- § 1037. Line located by mistake.
- § 1037a. Further consideration of subject.
- § 1038. Two descriptions in deed.
- § 1038 a. Middle point of physical object intended.
- § 1039. Repugnance between general and particular description.
- § 1040. Some illustrations.
- § 1041. Particular description uncertain.
- § 1042. Parol evidence.
- § 1043. Description applying to several tracts.
- § 1044. Quantity of land enumerated.
- § 1045. Intention that quantity shall control.
- § 1046. Words "more or less."

CHAPTER XXX.

DEED SUBJECT TO MORTGAGE.

- § 1047. Purchase of equity of redemption merely.
- § 1048. Mention of mortgage by way of description.
- § 1049. Contract to take deed subject to mortgage.
- § 1050. Deed to mortgagee subject to mortgage.

- § 1051. Effect of deed from mortgagor to mortgagee as against intervening encumbrancers.
- § 1052. Presumption of deduction of amount of mortgage from consideration.
- § 1053. Setting off mortgage against purchase money.
- § 1053a. Benefit of collateral security.
- § 1054. Sale of equity of redemption on execution.
- § 1055. Parol evidence to show grantee did not assume mortgage.
- § 1056. Purchaser becomes principal debtor.
- § 1056a. Purchaser's title not divested by nonpayment.
- § 1057. Extension of time.
- § 1058. Release of grantee.
- § 1059. Request of mortgagor to foreclose.
- § 1060. View that relation of surety does not affect mortgagee.
- § 1061. Comments.
- § 1062. Purchaser of a part of the land.
- § 1063. Grantee's defense against mortgage.
- § 1064. Part of consideration.
- § 1065. Purchaser at execution sale.
- § 1066. When grantee may show invalidity of mortgage.
- § 1067. Intention of grantee to assume should be clear.
- § 1068. Intention to be gathered from the whole deed.
- § 1069. Contemporaneous agreement.
- § 1070. Implying obligation on part of grantee.
- § 1071. Grantee's liability for attorney's fee.
- § 1072. Assumption of mortgage under contract of sale when deed made to another.
- § 1073. Grantee's verbal promise to assume.
- § 1074. Acceptance of deed.
- § 1075. Mistake in deed.
- § 1076. Acceptance by agent.
- § 1077. Deed without grantee's knowledge.
- § 1078. Grantee's implied promise to indemnify grantor.
- § 1079. Extent of grantee's liability.
- § 1080. Release of covenant against encumbrances by grantee's subsequent assumption.
- § 1081. When grantee is a married woman.
- § 1082. Legislation in New York.
- § 1083. Agreement for assumption in unusual place in deed.
- § 1084. Verbal agreement that grantor should advance money.
- § 1085. Fraudulent representations of grantor as to title.
- § 1086. Mistake in description.
- § 1087. Intermediate grant subject to first mortgage.
- § 1088. Collusion of grantee with the mortgagee.
- § 1089. Personal liability of grantor.
- § 1090. In Pennsylvania.
- § 1091. Enforcing grantee's promise before payment by grantor.
- § 1092. Discharge of mortgage by grantor.

- § 1093. Release of covenant by grantor.
- § 1094. Rights of grantor.
- § 1095. Deed to tenants in common.
- § 1096. Notice of rights of mortgagee from assumption clause in deed.
- § 1097. Grantee's right to deduct mortgages.
- § 1098. Grantee's purchase of outstanding title.
- § 1099. Deed subject to two mortgages.

CHAPTER XXXI.

DEED WHEN A MORTGAGE.

- § 1100. In general.
- § 1101. Rule at law.
- § 1102. Requirement as to time of execution.
- § 1103. Deed and defeasance may be shown by parol evidence to be parts of same transaction.
- § 1104. Condition in deed construed as lien.
- § 1105. Cancellation of defeasance.
- § 1106. Transfer of absolute title.
- § 1107. Waiver of right of redemption.
- § 1108. Confidential relations.
- § 1109. Notice given by recording.
- § 1110. Conditional sale or mortgage.
- § 1111. Purchase money mortgage by married woman.
- § 1111a. Same by natural guardian of minors.
- § 1112. Absolute deed as considered in equity when executed as security for money.
- § 1113. Deed to administrator.
- § 1114. Third person disputing character of instrument.
- § 1115. Whenever debt exists, transaction is a mortgage.
- § 1116. Voluntary deed and agreement for mortgage.
- § 1117. Absolute deed made upon application for loan.
- § 1118. Presumption of loan.
- § 1119. Sale may have been made.
- § 1120. Delivery of deed in payment of debt.
- § 1120a. Note for deficiency after payment of a pre-existing debt.
- § 1121. Purchase of mortgaged premises by mortgagee.
- § 1122. Liability for taxes.
- § 1123. Comments.
- § 1124. Third person as purchaser.
- § 1125. Agreement to reconvey showing absolute sale.
- § 1126. Agreement that grantee may sell.
- § 1127. Surplus after sale.
- § 1128. Agreement that grantee may buy.
- § 1129. Where no note is given.

- § 1130. Quitclaim deed.
- § 1131. Continued possession of grantor.
- § 1132. Payment of interest.
- § 1133. Inadequacy of price.
- § 1134. Character of transaction fixed in beginning.
- § 1135. Sale and resale.
- § 1136. Parol evidence.
- § 1137. Declarations of party as evidence.
- § 1138. Effect of delay in seeking relief.
- § 1139. Judgment creditor may show that debtor's deed is a mortgage.
- § 1140. Sheriff's deed.
- § 1141. Absolute owner as to third parties.
- § 1142. Notice in bankruptcy proceedings.
- § 1143. Payment of debt.
- § 1144. Parol evidence to show a mortgage a conditional sale.
- § 1145. Proof of other conditions.
- § 1146. Time for redemption.
- § 1147. Presumption in doubtful cases.
- § 1147 a. Trend of authority.

CHAPTER XXXII.

DEED TO ONE, PURCHASE MONEY PAID BY ANOTHER.

- § 1148. In general.
- § 1149. Legislation as to resulting trusts.
- § 1150. Deed to one, and purchase money paid by another.
- § 1151. Some instances.
- § 1152. Consideration paid by several.
- § 1152 a. Consent that title should be taken in name of another.
- § 1153. Deed taken in the name of one joint purchaser.
- § 1154. Interests acquired.
- § 1155. Purchase of specific part.
- § 1156. Deed taken by agent.
- § 1157. Payment made with agent's funds.
- § 1158. Agent at execution sale
- § 1159. Partnership funds.
- § 1160. Guardian and ward.
- § 1161. Wife's separate property.
- § 1161 a. Protection of wife's rights.
- § 1162. Trust funds generally.
- § 1163. Attorney's knowledge of defect in judicial proceedings.
- § 1164. Investment of stolen money.
- § 1165. Comments.
- § 1166. Surrender of contract for purchase of real estate.

- § 1167. Tenants in common.
- § 1168. Deed to wife or child.
- § 1169. Illustrations.
- § 1170. Parol agreement.
- § 1171. Where no obligation to provide exists.
- § 1172. Presumption rebuttable.
- § 1173. Married woman as agent of husband.
- § 1174. Payment of purchase money by alien.
- § 1175. Payment when title passes.
- § 1176. Gift or loan to cestui que trust.
- § 1177. Agreement to convey to another.
- § 1178. Resulting trust not converted into express trust by agreement.
- § 1179. Part payment under agreement to convey.
- § 1180. Advancing portion of money.
- § 1181. Agreement to purchase by two or more parties.
- § 1182. Parol evidence to establish trust.
- § 1183. Convincing proof required.
- § 1184. Parol evidence to rebut resulting trust.
- § 1185. Benefit inconsistent with the trust.
- § 1186. Professional services.
- § 1187. Conveyance of legal title only.
- § 1188. Laches of cestui que trust.
- § 1189. Deed without consideration.
- § 1190. Payment for improvements.

CHAPTER XXXIII.

FIXTURES PASSING BY DEED.

- § 1191. Definition of the term.
- § 1192. General rule between grantor and grantee.
- § 1193. Comments.
- § 1194. Purchaser at sale on execution.
- § 1195. Partition by tenants in common.
- § 1196. Mortgagee considered a purchaser.
- § 1197. General rule as to fixtures passing by deed.
- § 1198. Instances.
- § 1199. Notice of fixtures.
- § 1200. Conveyance of structure passing title to land.
- § 1201. Land necessary to use of structure.
- § 1202. Agreement for removal.
- § 1203. Chattels not annexed to the realty.
- § 1204. Same subject continued—Illustrations.
- § 1205. Use on the land.
- § 1206. Temporary removal.
- § 1207. Articles constructively annexed.
- § 1208. Machinery in mills.
- § 1209. Removal without injury.

- § 1210. Comments.
- § 1211. Proper test for considering machinery fixtures.
- § 1212. Value added to realty.
- § 1213. English view of movable machinery.
- § 1214. American cases.
- § 1215. Different view.
- § 1216. Effect of statute.
- § 1217. Right to remove under contract of purchase.
- § 1218. Application of rule.
- § 1219. Reason for rule.
- § 1220. Some illustrations.
- § 1220a. Buildings.
- § 1221. Word "fixtures" in deed.
- § 1222. Contract of purchase—Payment of rent.
- § 1223. Question of intention considered.
- § 1224. Same subject continued.
- § 1224a. Evidence of conversations.
- § 1225. Gas fixtures.
- § 1226. Manure.
- § 1227. Permanent severance.
- § 1228. Temporary severance.
- § 1229. Severance by act of God.
- § 1230. Stoves, furniture, etc.

CHAPTER XXXIV.

RESERVATION OF VENDOR'S LIEN IN DEED.

- § 1231. Equitable mortgage.
- § 1232. Payment in specific articles.
- § 1233. Not waived by taking other security.
- § 1234. Lien reserved for benefit of another.
- § 1235. Grantee takes legal title.
- § 1236. Destruction of record.
- § 1237. No particular form required.
- § 1238. Unrecorded vendor's lien.
- § 1239. Reservation of lien when not provided for in contract or sale.
- § 1240. Verbal agreement cannot control lien.
- § 1241. Estoppel of vendor.
- § 1242. Vendor's lien and subsequent mortgage.
- § 1243. Lien assignable.
- § 1244. Renewal of note.
- § 1244a. Extension of time of payment.
- § 1245. Growing crops.
- § 1246. Negotiable note not referred to in deed.
- § 1247. Comments.
- § 1248. Effect of second deed.

CHAPTER XXXV.

VENDOR'S IMPLIED LIEN.

- § 1249. Vendor's implied lien.
- § 1250. Independent of agreement.
- § 1251. Receipt for consideration.
- § 1252. Payment by another.
- § 1253. Homestead.
- § 1254. Presumption of lien.
- § 1255. Tenants in common.
- § 1256. Uncertain claim.
- § 1256 a. When purchase price may be paid in money or other mode.
- § 1257. Extent of lien.
- § 1257 a. Other interests in land to which lien will attach.
- § 1258. Assignment of lien.
- § 1259. Beneficial owner.
- § 1260. Transfer of note as collateral security.
- § 1261. Excess at execution sale.
- § 1262. Waiver of lien.
- § 1263. Taking a note.
- § 1264. Taking a check.
- § 1265. Payment at a future day.
- § 1266. Independent security.
- § 1267. Agreement to give security
- § 1268. Worthless security.
- § 1269. Subsequent purchasers.
- § 1270. Notice.
- § 1271. Unrecorded deed.
- § 1272. Enforcement of lien.*

CHAPTER XXXVI.

ESTOPPEL BY DEED.

- § 1273. Estoppel by deed—In general.
- § 1274. From what doctrine arose.
- § 1275. Validity of deed.
- § 1276. Deed void in part.
- § 1277. Registration of deed.
- § 1278. When truth appears, no estoppel.
- § 1279. Parties bound.
- § 1280. Representative capacity.
- § 1281. Estate bound.
- § 1282. Resulting trust.
- § 1283. Privies.
- § 1284. Right under which party holds.

- § 1285. Paramount title.
- § 1285a. Estoppel to assert homestead—After-acquired title.
- § 1286. Fraud.
- § 1287. Competency to contract.
- § 1288. Tenants in common.
- § 1289. Possessory title.
- § 1290. Descent.
- § 1291. Interests acquired by cotenant.
- § 1292. Widow of intestate.
- § 1293. Contract of sale.
- § 1294. Action of ejectment.
- § 1295. Acquisition of title at execution sale.
- § 1296. Sale under trust deed.
- § 1297. Comments.
- § 1298. Title accruing at different times.
- § 1299. Different rule in Illinois.
- § 1300. Comments.
- § 1301. Setting up tax title by tenant in common.
- § 1302. Taxes against joint interest.
- § 1303. Repurchase of tax title by tenant in common.
- § 1304. Provision of statute.
- § 1305. Estoppel against him only who ought to have paid.
- § 1306. Title acquired before creation of tenancy.
- § 1307. Bond for title and deed.
- § 1308. Deed obtained by fraud.
- § 1309. Deed of composition.
- § 1310. Estoppel limited by intention.
- § 1311. Estoppel against estoppel.
- § 1311 a. Reference to streets, alleys, and plats.
- § 1312. False representations..
- § 1313. Parol evidence.
- § 1314. Valuable consideration.
- § 1315. Estoppel of grantor in trust deed.
- § 1316. Mutuality.
- § 1317. Title from same source.

CHAPTER XXXVII.

MERGER.

- § 1318. A question of intention.
- § 1319. Continued.
- § 1320. Reference in deed to cancellation of mortgage.
- § 1321. Payment of mortgage.
- § 1322. Estoppel.
- § 1323. Purchase of equity of redemption by prior mortgagee.
- § 1324. Same person and same right.
- § 1325. Mortgagee's purchase.

- § 1326. Mortgage remaining uncanceled.
- § 1327. Ignorance of another mortgage.
- § 1327a. Mistake on satisfaction of mortgage.
- § 1328. Reaffirmation of mortgage.
- § 1329. Purchase at execution sale.
- § 1330. Cancellation of mortgage by deed.
- § 1331. Expression of intention against merger.
- § 1332. Comments.
- § 1333. Quitclaim deed.
- § 1334. Tenants in common.
- § 1335. Destruction of equitable estate.
- § 1336. Descent.
- § 1337. Deed for part of land.
- § 1338. Two mortgages.
- § 1339. Possession by mortgagee.
- § 1340. Prior assignee.
- § 1341. Mortgage in trust for married woman.
- § 1342. Reliance upon record.
- § 1343. Married women.
- § 1344. Deed to sureties.
- § 1345. Payment by party bound.
- § 1346. Covenant against encumbrances.

CHAPTER XXXVIII.

TAX DEEDS.

- § 1347. Scope of chapter.
- § 1348. Validity dependent upon antecedent proceedings.
- § 1349. Rule of caveat emptor.
- § 1350. Purchase not a contract.
- § 1351. Statutory regulation.
- § 1352. Advertisement of sale.
- § 1353. Special instances.
- § 1354. Continued.
- § 1355. Statement of amount of tax due.
- § 1356. Transposition of amounts due.
- § 1357. Designation of time and place of sale.
- § 1358. Subject continued.
- § 1359. Subsequent day.
- § 1360. Omission to state year.
- § 1361. Posting in public places.
- § 1362. Particular place of sale.
- § 1363. Publication of notice in newspaper.
- § 1364. Variance in name of paper.
- § 1365. Paper partly printed in county.
- § 1366. Publication in several newspapers.
- § 1367. Time of publication.
- § 1368. Parol evidence to correct mistake.

- § 1369. Date of paper.
- § 1370. Publication in supplement.
- § 1371. Printed notices.
- § 1372. Consent to irregularities.
- § 1373. Waiver of defects.
- § 1374. Estoppel.
- § 1375. Description of land in notice of sale.
- § 1376. Illustrations.
- § 1377. Further illustrations.
- § 1378. Continued.
- § 1379. Capability of identification.
- § 1380. Other requisites of the notice of sale.
- § 1381. Same subject continued.
- § 1382. Continued.
- § 1383. Authority to sell.
- § 1384. Limitation on sale.
- § 1385. Public sale.
- § 1386. Evidence.
- § 1387. Enjoining execution of deed.
- § 1388. Agreement to receive portion of taxes.
- § 1389. Conduct of officer.
- § 1390. Innocent purchaser.
- § 1391. Sale for cash.
- § 1392. Sale to highest bidder.
- § 1393. Separate parcels.
- § 1394. Other requisites.
- § 1395. Certificate of sale.
- § 1396. Tax deeds.
- § 1397. Preliminary requirements.
- § 1398. Purchaser's right to deed.
- § 1399. What the deed should contain.
- § 1400. Date, seal, etc.
- § 1401. Recitals.
- § 1402. Statement of facts.
- § 1403. Form of conveyance.
- § 1404. Reference to statutory provisions.
- § 1405. Description of land.
- § 1406. Illustrations.
- § 1407. Same subject continued.
- § 1408. Strictness of law as to description.
- § 1409. Execution of deeds.
- § 1410. Same subject—Other particulars.
- § 1411. Execution of deed after expiration of officer's term.
- § 1412. Comments.
- § 1413. Execution of second deed.
- § 1414. Purchaser's right to a correct deed.
- § 1415. Who may acquire title.
- § 1416. Purchase by party in possession.

- § 1417. Purchase by party whose land is jointly assessed with that of another.
- § 1418. Purchase by attorney.
- § 1419. Presumptions as to validity of deed.
- § 1420. Deed as evidence.
- § 1421. Prima facie evidence.
- § 1422. Deed as conclusive evidence.
- § 1423. Illegal sale.
- § 1424. What title passes by tax deed.

CHAPTER XXXIX.

DEEDS ON EXECUTION SALES.

- § 1425. Prefatory section.
- § 1426. Deeds of sheriff or constable.
- § 1427. Purchase by sheriff's agent.
- § 1428. Growing crops.
- § 1429. When deed is executed.
- § 1429a. Presumption of delivery.
- § 1430. What the deed should contain.
- § 1431. Illustrations.
- § 1432. Description.
- § 1433. Acknowledgment.
- § 1434. Effect by relation.
- § 1435. Worthless title.
- § 1436. Title obtained by purchaser.
- § 1437. Sale of interest of one defendant.

THE LAW OF DEEDS.

CHAPTER I.

INTRODUCTORY CHAPTER.

- § 1. Introductory.
- § 2. Historical view.
- § 3. Statute of *quia emptores*.
- § 4. Statute of frauds.

§ 1. **Introductory.**—A title is the means whereby the owner of lands has the just possession of his property. *Titulus est justa causa possidendi id quod nostrum est.*¹ In the ordinary acceptation of the term, a purchase is the voluntary conveyance of title by one living person to another. But in law, it signifies the acquisition of title by some act of the parties. Used in this sense, it includes title by deed, title by matter of record, and title by devise.² The term “purchase” is employed in contradistinction to “descent,” where title is vested by operation of law.³ The general distribution of title to land is into the heads enumerated, “purchase” and “descent.” By some, however, a less objectionable division has been considered to be title by purchase and title by act of law, the latter including descent, escheat, and forfeiture.⁴ By American authors a new title, unknown in the common law of Eng-

¹ This is the definition given by Sir Edward Coke: Co. Litt. 345; 2 Blackst. Com. 195.

² Greer v. Blanchar, 40 Cal. 194; Litt. § 121; 4 Kent's Com. 441; 2 Blackst. Com. 201.

³ “Purchase includes every mode of coming to an estate except inheritance”: Rhodes, C. J., in Greer v. Blanchar, 40 Cal. 194, 196.

⁴ Hargrave's note, Co. Litt. 18 b.

land, has been added; that is, title by execution.¹ The present treatise will be devoted to a consideration of the acquisition and conveyance of title by the voluntary act of the parties; or, in other words, of transfer of title by deed.

§ 2. **Historical view.**—It is difficult for us of the present day to conceive that the power of alienation, subject to the modifications and restraints required by civil society or imposed by civil institutions, is not a necessary and inseparable incident of ownership. In fact, the very word implies such a right of disposition. It has been said that, “the alienation of property is among the earliest suggestions flowing from its existence.”² It appears that at the time of the inhabitation of England by the Anglo-Saxons, the right of alienation, either by deed or will, existed.³ A distinction was made, it is to be observed, between *boc*, or bookland, and *folcland*; the former being conveyed by charter or deed, while the latter was conveyed without writing.⁴

¹ 4 Kent's Com. 424.

² The oldest conveyance of which any account has been transmitted, Barrington remarks, was that of the cave of Machpelah, from the sons of Heth to Abraham. He quotes from Genesis xxiii: “And the field of Ephron, which was in Machpelah, which was before Mamre, the field, and the cave which was therein, and all the trees that were in the field, that were in all the borders round about, were made sure unto Abraham”: Barrington on Statutes, 4th ed. 175.

³ Brevity and simplicity were characteristic of Saxon deeds. The words of conveyance were *do et concedo*, *dabo*, *trado*, or similar terms, expressed either in Latin or Saxon. They also contained a consideration with a brief description of the premises, following with the tenure, ending with the date, which, however, in some cases was placed at the beginning. The introduction of wax seals dates from the Norman conquest, as the Saxons possessed none: 2 Turner's Ang.-Sax. 351, 352; 3 Wash. Real Prop. 234. As an instance of the ordinances, in those early times, the following is taken from the *Mirroure*: “None might alien but the fourth part of his inheritance, without the consent of his heirs; and that none might alien his lands by purchase from his heirs, if *assigns* were not specified in the deed”: P. 11.

⁴ Wright on Tenures, 154, n.; Reeves' History of the English Law, vol. I., 1, 5, 10, 11; Spelman on Feuds, ch. 5; Spelman on Deeds and Charters, b. 7, ch. 1; 2 Blackst. Com. 90; 4 Kent's Com. 442. In Spel-

Even at that day, the right of disposition was subject to many restrictions. Not, however, until the feudal policy had attained its supremacy throughout Europe were rigorous restrictions imposed upon the free alienation of lands. As the law of feuds would not permit the vassal to alien the feud, without the consent of the heirs, even though the lord had given his consent, these restrictions were in a measure in favor of the tenant. But the lord was considered as possessing an abiding interest in the allegiance of his vassal, and consequently these restraints arose chiefly from favor to the lord. Restraints upon alienation were gradually eluded by the practice of subinfeudations. Portions were carved out of the fief, which were to be held of the vassal, by his subvassal in the same manner, and by the same tenure with which the vassal held of the chief lord of the fee. This practice was encouraged by the subordinate feudatories, because it tended to augment their power, and assisted, in part, the attainment of their own independence.

As a curious incident in history, it may be remarked that the crusades undoubtedly exercised a potent influence upon alienation of real property. Those who engaged in these expeditions abandoned their inheritances, and hence they became objects of little interest to them. In the reign of Henry I. a law was passed, the effect of which was to relax this restraint as to purchased lands; for over these a man was naturally deemed to possess a greater power than over those transmitted to

man's Glossary it is said that *boecland* was hereditary, and could not be conveyed from the heir without his consent, though that restriction was finally removed; nor could it be devised by will. It was the *folcland* that was alienable and devisable, and that possessed the nature of allodial property. (See tit. *Bocland* and *Folcland*.) According to Mr. Spence, *folcland* was left by the Saxons without specific appropriation, and subject to future appropriations, and considered as fiscal domains: Equitable Jurisdiction of the Court of Chancery, I., 8, 9. The same author says that it was the *boecland* that in the Saxon times was allodial, and could be freely disposed of by gift, sale, or will: Equitable Jurisdiction of the Court of Chancery, 20, 21.

him by descent. But there was a limitation placed upon this power, that he should not dispose of the whole of his possession so as to cause the complete disinheritance of his children. Nor did this power of alienation extend to those lands which were ancestral.¹

§ 3. The statute of *quia emptores*,² establishing the right of alienation by the subvassal, and the statute of uses, dispensing with the necessity of livery of seisin, a material part of the common-law conveyance of feoffment, made or tended to make lands freely alienable.³ But anterior to the passage of the statute of frauds⁴ there was no law which rendered necessary, as a mode of conveying lands, a deed or instrument in writing;⁵ excepting, of course, the conveyance of interests in lands which on account of their incorporeal nature could not be accompanied by a formal livery of seisin. These were said to lie in grant and not in livery, and could be transferred only by means of a deed.⁶ Another exception to be noted is in respect to a conveyance by bargain and sale, which by the provisions of the act of enrollment⁷ required a deed indented and enrolled. This statute had no application, however, to those other deeds which derived their operation and validity from the statute of uses; nor did it apply to deeds of feoffment.⁸

¹ Lombard's Arch. 203.

² 18 Edw. I.

³ 2 Blackst. Com. 289; 4 Kent's Com. 444, 445; 3 Wash. Real Prop. 553.

⁴ 29 Car. II.

⁵ Roberts on Frauds, 270; Browne's Stat. Frauds, 3, 4; Williams on Real Prop. 126.

⁶ 1 Wood on Conv. 7, 8; 2 Blackst. Com. 317; 3 Wash. Real Prop. 553.

⁷ 27 Hen. VIII, ch. 16.

⁸ Williams on Real Prop. 150. Reeves' History of the English Law contains a full statement *passim*, of the progress of the law of alienation, and a view of the same subject may be obtained in Sullivan's Historical Treatise on the Feudal Laws, §§ 15, 16; likewise in Dalrymple's Essays on Feudal Property, ch. 3. Blackstone treats of the subject of alienation of land in his accustomed happy manner: 2 Blackst. Com. 287-290. Reference is made to the same subject in Millar's Historical View of the

§ 4. **Statute of frauds.**—The statutes of the different States conform to the English statute of frauds, differing, naturally, in a few minor particulars, but in all a written instrument is necessary for the conveyance of land or of any interest in land. Performance of a condition in an agreement does not operate to revest the legal title in the grantor. A reconveyance is required, and that can be enforced only in equity. Accordingly, a writ of entry, or other equivalent real action, cannot be maintained against a tenant who holds an absolute deed from the demandant's or plaintiff's grantor, prior to the deed held by the demandant, although he, the tenant, has given a written agreement, not under seal, to reconvey to the grantor on performance of a condition, and the condition has been performed.¹ The fourth section of the statute of frauds enacts that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."²

English Government; likewise in 4 Kent's Com. 445; and in 3 Wash. Real Prop. (4th ed.) 232.

¹ *Wilson v. Black*, 104 Mass. 406. See also *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106.

² The Civil Code of California declares: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged or by his agent. . . . An agreement for the leasing for a longer period than one year, or for the sale of real property or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless

Owing to the similarity of the statutes of the different States to the original act, our courts adopt the decisions in England, respecting its construction, as good authority.¹ Many questions as to what is to be deemed a signature, within the meaning of the statute, to what interest in land the statute applies, and other cognate questions, have arisen, attention to which will be given in their proper order.

the authority of the agent be in writing, subscribed by the party sought to be charged": Civ. Code, § 1624, subd. 4. A similar provision is contained also in the Code of Civil Procedure, § 1971.

¹ *Bowman v. Conn*, 8 Ind. 58.

CHAPTER II.

DEFINITIONS AND DIFFERENT KINDS OF DEEDS.

- §. 5. What is a deed—Definitions.
- § 6. Agreement for a deed.
- § 7. Same continued.
- § 8. Illustrations.
- § 9. Classification of deeds at common law.
- § 10. Feoffment.
- § 11. Gift.
- § 12. Grant.
- § 13. Lease.
- § 14. Exchange.
- § 15. Partition.
- § 16. Release.
- § 17. Confirmation.
- § 18. Void deeds.
- § 19. Surrender.
- § 20. Assignment.
- § 21. Defeasance.
- § 22. Deeds under the statute of uses.
- § 23. Bargain and sale deeds.
- § 24. Covenant to stand seised to uses.
- § 25. Lease and release.
- § 26. Fine and recovery.
- § 27. Quitclaim deeds.

§ 5. What is a deed—Definitions.—The definition given by Lord Coke of a deed, is “a writing sealed and delivered by the parties.”¹ By another writer it is said “deed is somewhat used in jurisprudence in its general and vernacular sense of an act, something done. More frequently it has a technical meaning, denoting, *first*, a written instrument; and *secondly*, and more specifically, a conveyance. In the first and broader of these meanings, deed includes all varieties of sealed instruments. Even bonds and executory contracts under seal may be

¹ Co. Litt. 171; 2 Blackst. Com. 295.

included by the term. Still more clearly may assignments, leases, mortgages, and releases. In the second and more common yet narrower meaning, deed signifies a writing under seal conveying real estate. It is substantially the same in extension as conveyance, except that conveyance points to the transaction, the transfer, while deed points to the form of the instrument."¹ Although the word "deed" in its largest sense includes a mortgage, yet when the language of a contract shows that it was employed in a limited signification, and as meaning an instrument conveying the title to land, it will not be held in the construction of a contract to include a mortgage.² As the term is commonly used, a deed may be defined as "a writing under seal by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold."³ And in those States which have dispensed with the necessity of a seal, the words under "seal" in the definition would be surplusage. As, however, the law relating to the general requisites of deeds, their execution, acknowledgment, and registration, is common to all instruments or conveyances affecting title to real estate, the word "deed" in the present treatise, so far as these specified subjects are concerned, will be taken in its broader and general sense.⁴

¹ Abbott's Law Dict., tit. Deed.

² Hellman v. Howard, 44 Cal. 100.

³ 2 Sharswood's Blackst. Com. 294.

⁴ An instrument in writing under seal, whether it relates to the conveyance of real estate or to any other matter, as for instance a bond, single bill, agreement, or contract of any kind, is as much a deed as is a conveyance of real estate: Taylor v. Morton, 5 Dana, 365. A deed is nothing more than an instrument or agreement under seal: Master v. Miller, 4 Term Rep. 345. A deed does not *ex vi termini* mean a deed with covenants of warranty, but only an instrument with apt words conveying the property sold: Ketchum v. Everson, 13 Johns. 334; 7 Am. Dec. 384. A deed is a writing sealed and delivered: Osborne v. Tunis, 25 N.J. L. 633. "A writing or instrument written on paper or parchment, sealed and delivered": Jeffrey v. Underwood, 1 Ark. 112. "Of old the definition of a deed was an instrument consisting of three things, viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman": Best v. Brown, 25 Hun, 223. A written instrument under seal containing a contract or agreement which

§ 6. Agreement for a deed.—A distinction is to be drawn between a deed and an agreement for a deed. But to determine whether an instrument which is capable of bearing more than one construction, or which is drawn up without regard to the usual forms, is a deed, or simply an agreement for a deed which a court may enforce, is often a question of considerable difficulty. Each case must, of course, depend upon its own peculiar circum-

has been delivered by the party, to be bound and accepted by the obligee or covenantee: *McMurtry v. Brown*, 6 Neb. 376. Deed is a writing on paper or parchment, sealed and delivered. Acknowledgment is not a necessary part of the deed: *Wood v. Owings*, 1 Cranch, 86. In Michigan, the word "deed" in the laws relating to forgery, includes a mortgage: *People v. Caton*, 25 Mich. 388.

What Constitutes a Deed.—The cases cited below illustrate the different classes of instruments, which are in effect a deed;—a deed which provides that it shall take effect after the death of the grantor is a deed, not a will: *Seals v. Pierce*, 83 Ga. 787; 20 Am. St. Rep. 344; *Chavez v. Chavez*, (Tex. May 2, 1890), 13 S.W. Rep. 1018; *Wilson v. Carrico*, 140 Ind. 533; 49 Am. St. Rep. 213; *Rawlins v. McRoberts*, 95 Ky. 346; *Knowlson v. Fleming*, 165 Pa. St. 10; *Diefendorf v. Diefendorf*, 56 Hun, 639; 8 N. Y. Supp. 617. An instrument in the form of a deed conveying grantor's property to another in trust, for specified purposes, in consideration of one dollar, and, conveying for a further consideration of one dollar to the same grantee all the property of which the grantor may die seised or possessed, except certain property which is conveyed to other grantees named in the deed, is a deed and transfers the title to such property to the grantees immediately: *Kyle v. Perdue*, 87 Ala. 423. An instrument reciting an indebtedness, as a consideration, and that the grantor granted, etc., all his right, etc., to grantee, certain land for which the grantor had instituted an action, which was still pending, and authorizing the grantee to prosecute said action for his own benefit in the grantor's name, and authorizing the grantee to dispose of same, is a deed: *Seeligson v. Singletary*, 66 Tex. 271. An instrument in the following form is a deed: "November 20th, 1879, a will between S. and L. I, —, have made agreement with —, that he shall take care of me from this day to my death, and I give him all my goods and real estate, and property of all kinds and description that I own, excepting \$50, which I give G. All debts shall be paid by said —, that I owe (giving a description of certain real property):" *Evenson v. Webster*, 2 S. Dak. 382; 44 Am. St. Rep. 802. An instrument provided that, in consideration of the right of way "granted" by T. to A., for the purpose of building a railroad track, it agreed to pay to E. T. \$200 a year, for five years; the first payment to be made on the day on which the first train passes over said right of way. It was decided that the instrument was an absolute conveyance of such right of way: *Des Moines Co. Agl. Soc. v. Tubbessing*, 87 Iowa, 138.

stances, but we may state, as a general rule, that whether an informal instrument purporting to transfer an interest in real estate shall operate as a conveyance of the title or only as an agreement to convey, depends not upon any particular words and phrases, but on the intention of the parties, as collected from the whole contract, and then, in case of doubt, resort is to be had to the circumstances attending the transaction.¹ Thus, where a father con-

A grantee indorsed upon a deed to himself the following assignment: "I assign the within to Elizabeth Graham for value received of her, the sum of \$1,463.33, this April 11, 1843," and duly signed and acknowledged it. The assignment was held to constitute a conveyance of the land described in the deed: *Harlowe v. Hudgins*, 84 Tex. 107; 31 Am. St. Rep. 21. One E., in anticipation of marriage, conveyed to a trustee, certain stocks and bonds, authorizing the trustee to collect interest thereon, and to pay the same to her during her life, "and at the death of said E., the property hereby conveyed shall pass to the children of said E., if she shall leave any, but if she leaves no children, the same shall pass to her heirs at law, as though the same were real estate." It was held, that the instrument was an irrevocable trust deed: *Claiborne v. Radford*, 91 Va. 527. An instrument reciting that in consideration of a person named, paying a mortgage note on certain property, the heirs of the deceased owner do transfer all their rights, titles, and privileges in the said property belonging to their ancestor, renouncing all their interest in his favor is a conveyance of the property: *Warner v. Reddy*, 46 La. Ann. 1099.

But where defendant held a mortgage on a lot, and was in possession thereof collecting the rents, with the consent of the owner, her husband's brother, who could not read English, and who was a nonresident—and where she prepared a quitclaim deed in English, without making the grantor's wife a party, though she knew he was married, and inclosed it in a letter written in Swedish, their native tongue, in which she called it a power of attorney, and requested him to execute it and return to her, saying she was having litigation about the rents and wanted it for use at the trial—it was held that the instrument should not have the effect of a deed: *Shouler v. Bonander*, 80 Mich. 531. An indorsement upon a deed, "I relinquish all my right and title to the within deed," signed by the grantee, dated and subscribed by one witness, under a law requiring two witnesses to a deed, it was held, did not operate as a reconveyance of the legal title: *Tunstall v. Cobb*, 109 N. C. 316. For a discussion of the circumstances under which an instrument purporting to be a deed may take effect as a will, see section 309 and notes, *post*.

¹ *Kenrick v. Smick*, 7 Watts & S. 41; *Bell v. McDuffie*, 71 Ga. 264; *Seitzinger v. Ridgway*, 4 Watts & S. 472; *Ogden v. Brown*, 33 Pa. St. 247; *Stewart v. Lang*, 37 Pa. St. 201; 78 Am. Dec. 414. And see, also, *Garver v. McNulty*, 39 Pa. St. 473; *Bortz v. Bortz*, 48 Pa. St. 382; *De-
fraunce v. Brooks*, 8 Watts & S. 67.

veyed land to his three sons, who bound themselves by a writing under seal, to pay to their sister one-fourth of the value of the lands, at that time, after payment of the debts of their father, the court considered the agreement to be a mere covenant, and that it did not operate as a conveyance to the sister of any interest in the lands.¹

§ 7. **Same continued.** — The strongest words of conveyance in the present tense will not pass an estate if from other parts of the instrument a contrary intent be apparent.² Though formal and apt words may be used in a deed, yet, if it be apparent from the other parts of the instrument, taken and compared together, that all that was intended was a mere agreement for a conveyance, the intent shall prevail.³ For illustration, a deed purported by its formal commencement to be only articles of agreement, and concluded by binding the parties to each other in a penalty for the performance of the covenants and grants contained in the deed. It also contained words of bargain and sale, or an absolute conveyance *in præsentia*, to one of the parties and his heirs, but the court deemed the instrument to amount to no more than an agreement to convey.⁴ An instrument signed by two

¹ Galbraith v. Fenton, 3 Serg. & R. 359. An indorsement on a land office certificate declaring that the holder thereof has sold "the within described land" to another is an agreement to convey: Sayward v. Gardner, 5 Wash. St. 247. A Hebrew marriage certificate containing a contract for the distribution of land (donated to the bride by a previous marriage contract) after the death of the parties, and purporting to be signed by the bride, groom, two witnesses, the rabbi and a person styling himself "secretary," cannot convey the land, for it does not purport to convey any property otherwise than by ratifying the donation previously made: Pluche v. Jones, 54 Fed. Rep. 863.

² Williams v. Bentley, 27 Pa. St. 294; Gray v. Packer, 4 Watts & S. 17: See, also, decided upon the circumstances existing in each case, Moody v. McCown, 39 Ala. 595; Jackson v. Clark, 3 Johns. 424; Doe v. Smith, 6 East, 530; Atwood v. Cobb, 16 Pick. 227; 26 Am. Dec. 657; Ives v. Ives, 13 Johns. 235; Jackson v. Kisselbrack, 10 Johns. 336; 6 Am. Dec. 341.

³ Jackson v. Montcrief, 5 Wend. 26; Stouffer v. Coleman, 1 Yeates, 393; Neave v. Jenkins, 2 Yeates, 107; Sherman v. Dill, 4 Yeates, 295; 2 Am. Dec. 408; Jackson v. Blodgett, 16 Johns. 172.

⁴ Jackson v. Myers, 3 Johns. 395; 3 Am. Dec. 504. An instrument which in terms purported to be a conveyance of land, but not being by

parties provided that if the first would support the second during her life, pay her debts, and render her certain other services, and bury her properly at death, the first should have all of the property of the second party after her death, except certain furniture, "none of which," said the instrument, "is sold or contracted away by these articles of agreement." The instrument contained no words of grant or conveyance, and the court held it not to be a deed.¹ To operate as a deed, while no prescribed form is required, yet the instrument must be sufficient of itself to show that the parties intended to convey the land.² An agreement for a future conveyance is superseded by and merged in the deed subsequently executed in pursuance of such agreement.³

§ 8. Illustrations.—Although the instrument may contain words of conveyance, yet if it shows that the parties contemplate the execution of another deed, such instrument is not a conveyance.⁴ A father by articles of

deed, could not operate as such, which contained a stipulation not to disturb the party intended to take the premises, was held to operate as an agreement and not as a deed: *Rex v. Ridgewell*, 6 Barn. & C. 665; 9 Dowl. & R. 678.

¹ *Brewton v. Watson*, 67 Ala. 121.

² *Bell v. McDuffie*, 71 Ga. 264.

³ *Schenley v. Pittsburgh*, 104 Pa. St. 472.

⁴ *Stokely v. Trout*, 3 Watts, 163. In this case the instrument in question was as follows: "Articles of agreement between George W. Trout and J. Stokely, both of Westmoreland county, and state of Pennsylvania; witnesseth, that the said George W. Trout for and in consideration of the sum of eighty-seven dollars and fifty cents, to be paid as heretofore mentioned, and as well as for and in consideration of one dollar to him in hand paid by J. Stokely, at and before the delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and aliened, enfeoffed, released, and confirmed to the said Stokely, his heirs or assigns, a certain lot or piece of ground situated in the vicinity of Robbstown, known as the lot or piece of ground held formerly by Dr. H. B. Trout, with the appurtenances and tenements thereon erected, and do further assign over to the said Stokely the article of John Robinson Mason, and bind myself, my heirs, executors, or administrators, to make to said Stokely, against the 1st of April, 1828, a more complete deed of conveyance for the same, and Stokely binds himself to pay thirty-nine dollars against the 1st of July or settle that amount with

agreement "agreed to give to" his two sons, "the farm I now live on to farm, likewise the farming utensils to enable them to carry on farming said place for and during my natural life, and to have all the proceeds of the place or what they raise off it, and manage the same to the best advantage for themselves, to pay all taxes, and to have all they can make off it." The court held that there was not a word in the conveyance indicative of a present assurance. "Courts, in my opinion," said Thompson, C. J., "should be slow to give the effect of absolute conveyances to instruments for provisions made between parents and children, of the kind of which we are speaking, unless the intention be very clear. Such agreements are usually fruitful sources of strife, litigation, and very often of great wrong to aged and feeble parents, and when held to be absolute conveyances, it puts them entirely at the mercy sometimes of unwilling, and often unkind offspring. There is no security in a conveyance for such purposes, unless it be most distinctly and expressly so made to appear on its face. If this were to be held to be a conveyance of a life estate to the sons as grantees, the grantor would be at their mercy, with no security for maintenance but their personal covenant. They might sell the estate, or it might be sold for their debts, and their parents be made to become a public charge, and the object of it entirely defeated. Happily, as already said, there are no words, provisions, or intention requiring such a conclusion."¹ In another case where a peculiar instrument was construed, A had commenced a suit in ejectment and had entered into articles of agreement with B, which recited the pendency of the suit, and that he had given B a power of attorney to prosecute the suit to judgment, and then stated that A had agreed to grant, bargain, and sell, "and thereby did

John Nicholls, and pay the balance of forty-seven dollars fifty cents against the 1st of April, 1828. In testimony whereof, we have hereunto set our hands and seals, February 13, 1827."

¹ Shirley v. Shirley, 59 Pa. St. 267, 273.

grant, bargain, and sell," the land which was the subject of litigation, to B and his heirs. It was then said, in the articles, that B should prosecute the suit by virtue of the power of attorney given by A; that if he should be successful and should pay A a specified sum of money, A should convey the land to him in fee; that B was to bear the expenses of the suit, and if A's title did not prevail, he was not to pay the sum of money specified, or any part of it. This agreement was held to be executory only, and that by it A's title was not divested.¹ Although an instrument recites that an owner of land "has granted, bargained, and sold" it, yet if it appears from the whole instrument, and also from an agreement contemporaneously executed that the parties intended to execute a title bond and not a deed, the title will not pass.²

¹ *Maus v. Montgomery*, 11 Serg. & R. 329. Said Tilghman, C. J.: "Now nothing can be more clear than that this was an executory agreement, notwithstanding the words of immediate grant inadvertently introduced. We must take the whole writing into consideration in order to judge of its intent and operation. To construe it, as an immediate conveyance, would be in direct contradiction to the intent of the parties, manifested in almost every line. An immediate conveyance would disable the plaintiff from recovering this suit, whereas the intent was that the suit should be prosecuted to judgment in the plaintiff's name, and no money paid unless he recovered; and if he did recover, he was to execute a conveyance. It would be a waste of time to multiply words to prove the intent of this instrument."

² *Chapman v. Glassell*, 13 Ala. 50; 48 Am. Dec. 41. In that case the title bond made by Glassell to Chapman recited that the "said Glassell, in consideration of the sum of \$3,600, the receipt whereof is thereby acknowledged, hath this day granted, bargained, and sold unto Alexander Chapman the following described tracts of land [the land being described]. Now should the said Glassell make to the said Alexander Chapman titles in fee-simple to the above-mentioned tracts of land, then this obligation to be void, otherwise to remain in full force and effect." It is further agreed between the parties, that said Glassell shall make such titles as he has to the above land." A writing in the form: "This is to certify that I have bargained and sold the one equal half of lot No. 30, in the great location of the sable, for fourteen shillings per acre, to Rufus Green, the interest to commence from the 1st July, 1792," was held to be a mere agreement for a conveyance, and not a conveyance or a lease; *Jackson v. Clark*, 3 Johns. 424. The fact that an instrument states that when a patent is obtained, the grantor will execute to the grantee a deed in fee, with covenants of warranty, does not render it a

§ 9. Classification of deeds at common law.—At common law the conveyances called original or primary, by which an estate was first created, included feoffment, gift, grant, lease, exchange, and partition. The others, denominated derivative or secondary, by which an estate originally created was enlarged, restrained, transferred, or extinguished, comprised release, confirmation, surrender, assignment and defeasance.¹ Many of the statutes which declare that a prescribed form shall be sufficient to operate as a transfer of title refer, directly or indirectly, to these common-law modes of conveyance, as common and

less perfect conveyance if it expresses a consideration and states that the grantor sells and conveys the land described: *Threadgill v. Bickerstaff*, 7 Tex. Civ. App. 406. If a party reserves to himself a power of sale, on conditions, yet if the instrument is executed and attested as a deed, and conveys real and personal property, it is entitled to be recorded as a deed: *First Nat. Bank v. Cody*, 93 Ga. 127. But an instrument reciting that the grantor has sold and delivered to the grantee, his heirs and assigns a certain number of acres out of an unpatented survey of a larger number, binds the grantor to make a good warranty deed to the same. It is a bond for a title and not a complete conveyance: *Peterson v. McCauley* (Tex. Civ. App.), 25 S. W. Rep. 826. Where a son, having an undivided interest in land contingent upon his father's death, executed an instrument reciting that thereby he did "sell, set over, transfer, and assign" all his interest to A, and covenanted to give a deed immediately on the death of his father, and the instrument also assigned an insurance policy to A for the purpose of securing the repayment of the purchase money paid by A in case the son's title should fail, it was held that the interest had the effect to convey the son's interest in the land: *Pickert v. Windecker*, 73 Hun, 476. A grantor executed a conveyance reciting that he desired to distribute his estate, to take effect after his death, and in which he aliened, sold, and conveyed land to his nephews. The instrument also recited that it was to be recorded, but it was not to take effect so as to give possession until after the grantor's death, and he stipulated that at his death whatever personal property remained was to be divided between the nephews mentioned. The court held the instrument to be a deed, and that the recital that it was not to take effect until after his death referred to the possession: *Rawlings v. McRoberts*, 95 Ky. 346. See, also, *Warner v. Reddy*, 46 La. Ann. 1099; *Pluche v. Jones*, 4 C. C. A. 622; 2 U. S. App. 555; 54 Fed. Rep. 860; *Des Moines County Agr'l Society v. Tubbessing*, 87 Iowa, 138; *Sayward v. Gardner*, 5 Wash. St. 247; *Evenson v. Webster*, 3 S. D. 382; 44 Am. St. Rep. 802.

¹ 2 Blackst. Com. 310; 3 Wash. Real Prop. 603.

usual forms. But as most of them have fallen into disuse, a very brief description only of each will be given.

§ 10. **Feoffment.**—Feoffment has given place in England to other modes of conveyance; and it was never in use to any considerable extent in this country.¹ It was defined as “the gift of any corporeal hereditament to another.”² It consisted in a formal declaration by the feoffor, that he gave the estate to the feoffee, accompanied by a public delivery of the possession of the land. This delivery of possession was termed livery of seisin, which was “in deed,” when it took place on the land, and “in law,” when it was made in sight of the land.³ This mode of conveyance was necessary to the transfer of those estates only which took effect in possession, and hence, it was requisite that the feoffment and livery of seisin should both occur at the same time. The custom arose even before the statute of frauds of making written deeds, expressing the intention of the parties and the terms of the gift. These deeds did not, however, dispense with the necessity of livery of seisin, as they did not of themselves pass the title, but were only evidence of the transfer.⁴

§ 11. **Gift.**—When an estate in tail is created, the proper mode of conveyance is a “gift,” as feoffment is strictly applied to the conveyance of an estate in fee.⁵ This is using the term “gift” in its strictest sense; for in its largest signification, it includes a gratuitous transfer of property, or a transfer without a valuable consideration.⁶ Where a mother made a deed to her eight children, some

¹ See *Eckman v. Eckman*, 68 Pa. St. 460; *Perry v. Price*, 1 Mo. 553; *Bryan v. Bradley*, 16 Conn. 474.

² 2 Blackst. Com. 310. See *French v. French*, 3 N. H. 234, 260.

³ Co. Litt. 48 a; 2 Blackst. Com. 315.

⁴ The possession of a deed by one who purports to be the grantee of an estate is no evidence of title in the grantor, unless his possession at some time of the land granted or his ownership is shown *aliunde*: *Smith v. Lawrence*, 12 Mich. 431.

⁵ 2 Blackst. Com. 316.

⁶ Wood on Conv. 1; Watkins on Conv. (Preston's ed.) 199. And see *Pierson v. Armstrong*, 1 Iowa, 282; 63 Am. Dec. 440.

of whom were married women, conveying eight-ninths of two large tracts of land, reserving one-ninth to herself, and the deed stated that it was made "in consideration of the natural love and affection which I have and bear to my said children, and for the further sum of five dollars, to me in hand paid before the sealing and delivery of these presents," it was held that the deed imported upon its face a gift within the meaning of the provisions of the constitution and statutes of California, relating to the separate property of married women, and not a conveyance for a pecuniary consideration.¹ Under the law of California, the grantees therefore took a separate estate. So, where a grantor conveyed to his children an undivided interest in a six-league ranch of great value, in consideration of love and affection, "and in the further consideration of four hundred and sixty-one dollars, to him in hand paid by said parties of the second part," it was held that the deed itself, in connection with the difference between the value of the property conveyed and the small sum named as the consideration, and in view of the condition of the parties, their relations, and the surrounding circumstances, showed that the transaction was a gift, and not a sale.² Where possession is given and taken,

¹ *Peck v. Vandenberg*, 30 Cal. 11.

² *Salmon v. Wilson*, 41 Cal. 595. Said Crockett, J., in delivering the opinion of the court: "If the recital of this paltry money consideration, so insignificant as compared with the value of the estate, is to convert the transaction into one of bargain and sale, no reason is perceived why the same result would not have ensued if the sum named had been one dollar or one cent for each of the children, instead of fifty-eight dollars. The disproportion between the price named and the value of the estate would only have been a trifle greater in the one case than in the other; but in either case it is so enormously large as clearly to indicate that the money consideration did not, in fact, enter into the transaction as one of its material elements. It was clearly the intention of Bojorques to donate this large and valuable estate to his children in equal portions, and not to sell it to them. Hence, we find the conveyance to his married daughters is made to them in their own names, excluding their husbands; and in the case of Theodosia, she is named by her maiden name, and her husband is not referred to. The parties to the deed must be presumed to have known that under the law, as it then was and now is, all property acquired by the wife during the marriage by

and acts are performed by the donee to carry out the gift, it may be made by parol. An equitable title passes, and the donees can obtain a decree giving them the legal title, or can acquire such title by adverse possession for the statutory period.¹ Where both husband and wife were named as grantees in a deed reciting the payment of a money consideration, no consideration, however, having been paid, and the evidence showing that the conveyance was intended as a gift, it was held in Texas, that by the terms of the deed, the gift was to both husband and wife, and that the wife obtained an undivided half interest as her separate property.²

§ 12. **Grant.**—Conveyance by grant is said to be “the regular method by the common law of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had.”³ But in England, by the Act of 8 and 9 Vict. 106, § 2, corporeal as well as incorporeal hereditaments may now be transferred by deed of grant. In California, as also in New York, grant is used as a generic term, including all kinds of transfers of title to real estate.⁴ Taken in its largest sense, grant may in-

gift, bequest, devise, or descent, became her separate estate, and that all acquired otherwise became the common property of the husband and wife, and was subject to disposition by the husband without the consent of the wife. It is clear that Bojorques, in conveying this valuable property to his married daughters, had no intention to convey it, practically, to their husbands, and particularly in the case of Theodosia, who had been for some years living apart from her husband. But if we should hold that the insertion in the deed of an inconsiderable money consideration by the scrivener who drew it up had the effect to convert the transaction into one of sale, I am convinced we would give an effect to this deed which never entered into the minds of the parties to it at the time it was made.”

¹ *Bakersfield Town Hall Association v. Chester*, 55 Cal. 98. See, also, as to gifts, *Adams v. Lansing*, 17 Cal. 629; *Barker v. Koneman*, 13 Cal. 9.

² *Bradley v. Love*, 60 Tex. 472.

³ 2 Blackst. Com. 317.

⁴ Civ. Code Cal. § 1053. In Vermont and New Jersey, it has a similar meaning, applying in the former to all conveyances by deed, except those of gift, and in the latter signifying every ordinary mode of acquiring property by deed, and comprising such as operate by way of uses: 3 Wash. Real Prop. 605.

clude feoffments, bargains and sales, gifts, leases in writing, and perhaps without writing; in a word, it may be applicable to all transfers of real property.¹ As there could be no livery of seisin of incorporeal rights, they were said to lie in grant and not in livery. Hence, the only method by which they could be conveyed was by deed of grant, followed by delivery of the deed to the grantee.²

¹ *Ross v. Adams*, 28 N. J. L. 160, 165. Vredenburg, J., said: "Did the legislature intend to use these terms 'gift' or 'grant' in their narrowest technical sense. I think not; but to embrace in the terms 'gift' and 'grant,' 'devise' or 'bequest,' all the modes of acquiring property, except, perhaps, by descent. This language is used by the legislature of 1852. Gift and grant had then long ceased to be understood, even by the profession, and in all ordinary instruments, even such as deeds, in their ancient technical meaning. In practice for many years, females as well as others had ceased receiving lands by the strict technical forms of gift or grant. It cannot be intended that the legislature meant to restrict the rights of married women to lands received in a mode which had fallen into disuse. In the State of New York the term 'grant' had for many years technically as well as in common language, included all modes of acquiring lands by deed or conveyance. It is true that this was done by special statute; but still this had only the more strongly fixed this meaning in the public mind. The Vermont statute provides that any rights in real estate which a *femme covert* may acquire by gift, grant, devise, or inheritance during coverture, shall not be liable for the debts of the husband. These words, 'gift' or 'grant,' came up for construction in the case of *Peck v. Walton*, 26 Vt. 85, wherein Redfield, Chief Justice, in delivering the opinion of the court, says: 'It is very apparent that the statute was intended to embrace all rights in real estate which the wife shall acquire during coverture. It would be a very nice, and, as it seems to me, a very unintelligible construction of this statute to limit the word "grant" to its narrowest technical import. It evidently was intended to apply to all conveyances by deed which were not gifts.' That case was like the present, a mortgage of the wife's property by the husband, the wife not joining. In our statute, by the term 'grant,' the legislature intended all the ordinary modes of acquiring property by deed, whether operating by force of the statute of uses or not, that by long usage such had not become not only the popular but also the technical meaning of the term."

² This for that matter is still the law, as an easement over land, or a right to take coal or timber from land, can be conveyed or created only by deed: *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203; *Drake v. Wells*, 11 Allen, 141. This matter will be fully treated in a subsequent chapter. Where "give and grant" are followed by "bargained and sold," these words qualify the mode of gift and grant, and as a result convert the conveyance into a bargain and sale without its being a feoffment: *Matthews v. Ward's Lessee*, 10 Gill & J. 443.

§ 13. **Lease.**—Lease is a conveyance of lands and tenements to a person for life, or years, or at will, in consideration of a return of rent or other recompense.¹ In early times, a writing was not necessary for the creation of a lease for any period. But an entry was necessary for its perfection, for after entry, the lessee had the capacity to take a conveyance of the reversion or remainder, by a deed simply dispensing with the ceremony of livery of seisin. The old rule that a freehold could not commence *in futuro* did not apply to leases, as the feudal seisin of the land was not affected by the grant of a term.²

§ 14. **Exchange.**—An exchange is a mutual grant of equal interests, the one in consideration of the other. The estates exchanged must be equal in quantity, not necessarily of value, for that is considered immaterial. The equality must be of interest; as for instance, fee simple for fee simple, a lease of twenty years for a lease of twenty years and the like.³ At common law the exchange was, perfected by a natural entry, and was not considered complete until then, but livery of seisin as such was not necessary. The transaction was not valid without a deed when the interests exchanged included estates not in possession.⁴ Where each of two persons owns a tract of land under a bond for a title, they cannot, it is held, under the statute of frauds, exchange the tracts by surrendering possession and delivering the respective bonds to each other.⁵

¹ Cruise Dig. tit. Lease.

² Williams v. Downing, 18 Pa. St. 60. In that case there was an assignment of a lease to commence *in futuro*.

³ Wilcox v. Randall, 7 Barb. 633. Exchange of lands is a mutual grant of equal interests in lands or tenements, the one in exchange of the other: Long v. Fuller, 21 Wis. 123.

⁴ Deane's Princ. of Conv. 303. In cases of this kind it was necessary to use the word *escambium*, or exchange. That the deed should be indented seems also to have been considered necessary: Co. Litt. 51; 3 Wood on Conv. 243; Watkins on Conv. b. 2, ch. 5; Cruise Dig. tit. 32.

⁵ Connor v. Tippet, 57 Miss. 594. In Raubitschek v. Blank, 80 N. Y. 478, A and B verbally agreed to exchange real estate, A to pay B five

§ 15. **Partition.**—Partition is a division of real estate made between joint owners, such as coparceners, joint tenants, or tenants in common. When partition was made between joint tenants or tenants in common, a deed was required, and in every case livery of seisin was necessary.¹ The power of compelling partition is a branch of the jurisdiction in equity, and as such has been exercised in England since the time of Elizabeth.² Though it has lost its early incidents, partition is retained as a means of securing the division of property; and in the United States, where the rules and method of procedure in partition are generally provided for by statute, courts of equity, unless the statute takes away their power, still maintain their original jurisdiction over it. In one case, where it was contended that the statute furnished an exclusive remedy, the court said: "This bill is in the form of a bill for a partition, and it may be properly regarded as a bill in equity. We think such a bill may be well maintained. There are no negative words in the statute providing for a partition upon petition, and the partition of real estate is an undoubted branch of equity jurisdiction. The proceeding in equity is much more simple and convenient than that provided by statute, which is rendered difficult and annoying by a great number of rigid rules as to details."³

hundred dollars as the difference in value of the two tracts of land. A gave a check for that amount in payment, and B signed and delivered a receipt for that amount. In an action on the check, which had been lost, there was parol evidence that it specified the lands, the price of each piece, and the amount of the mortgages to be executed, but it did not appear that the terms of credit were specified. A refused to enter into the written contract, and stopped payment of the check. The court held, Folger, J., dissenting, that the burden was upon A to show a failure of consideration; that the receipt and check, taken together, showed a good consideration for the check, the contract being valid under the statute of frauds, and that it was enforceable in equity against B.

¹ 2 Blackst. Com. 324.

² Story Eq. Juris. § 647; 1 Wash. Real Prop. 677.

³ Whitten v. Whitten, 36 N. H. 326, per Bell, J. See Patton v. Wagner, 19 Ark. 233; Adams v. Ames Iron Co., 24 Conn. 230; Spitts v. Well, 18 Mo. 468; Greenup v. Sewell, 18 Ill. 53; Welbridge v. Case, 2 Cart. 36.

§ 16. **Release.** — In a conveyance by release, a formal livery of seisin was not necessary, as the lessee was already in possession, but an express release by act of the parties required a deed.¹ A release was used to add a reversion or remainder to an estate for life or for years, or to convey an undivided interest in land to a joint tenant. It was a discharge or conveyance of a man's right in lands or tenements to another who already had an estate in possession.² As this mode of conveyance derived its force from the possession given to the lessee under the statute of uses, it required two deeds, a lease and a release.³ With the exception that possession in the lessee or grantee is not necessary, deeds by release, in some respects, resembled our modern quitclaim deeds.⁴

§ 17. **Confirmation.** — A confirmation is the approbation or consent to an estate already created, which, as far as it is in the confirming power, makes it good and valid.⁵ "Confirmation may make good a voidable or defeasible estate, but cannot operate upon or aid an estate which is void in law, but only confirms its infirmity."⁶ For this

¹ Deane on Conveyancing, 304.

² Burton Real Prop. 15; Shep. Touch. 320; 3 Wash. Real Prop. 606.

³ Until the passage of the statute of 7 and 8 Vic., ch. 106, this was the usual mode of conveyance in England; but the statute of 1841 dispensed with the necessity of a formal lease: Williams Real Prop. 146; Rogers v. Eagle F. Ins. Co., 9 Wend. 611, 628; Lalor on Real Estate, 249. The statute refers to persons who have a use "in fee simple, fee tail, for a term of life, or for years," and provides that they "shall henceforth stand, and be seised, deemed, and adjudged, in lawful seisin, estate and possession, of and in the same." The statute makes the interest an estate, without an actual entry, which was necessary at common law: Burton Real Prop. § 131, p. 43, n.

⁴ See § 27. The words generally used in such a conveyance at common law were "remise, release, and forever quitclaim," similar to the language employed in quitclaim deeds: Litt. § 445. In some of the States the only difference between them and quitclaim deeds is that the latter are treated as original conveyances: Kerr v. Freeman, 33 Miss. 292; Rogers v. Hillhouse, 3 Conn. 398; Hall v. Ashby, 9 Ohio, 96; 34 Am. Dec. 424; Wade v. Howard, 6 Pick. 492. See, also, Doe v. Reed, 5 Ill. 117; 38 Am. Dec. 124; Pray v. Pierce, 7 Mass. 381; 5 Am. Dec. 59; Porter v. Perkins, 5 Mass. 233; 4 Am. Dec. 52.

⁵ People v. Law, 34 Barb. 511.

⁶ Sanderson, C. J., in Branham v. San Jose, 24 Cal. 585, 605, who

reason, where a municipality had mortgaged its lands, and the lands had been sold to certain purchasers at the foreclosure sale, the court held that an agreement between the municipal authorities and the purchasers at the judicial sale, confirming unto them all the rights and interests in such lands, which they acquired by their purchase at the sheriff's sale, and releasing unto them all the right and title which the city then had, or might afterwards have in the lands, was void, the original mortgage being void, and conferred upon the purchasers no new right.¹ Under some circumstances, to effectuate the intention of the parties, effect will be given to deeds of confirmation as bargain and sale deeds.²

§ 18. **Void deeds.**—But a deed that is void for want of a delivery, or through a mistake in reciting the name of the grantee, cannot be confirmed by a subsequent deed given for that purpose.³ If by reason of fraud a deed is void, it cannot be made valid by the legislature so that the rights of third persons shall be affected.⁴ If a second deed contains recitals that it is given to confirm a former one in which there were mistakes, and the first deed was void, thus rendering confirmation impossible, the recitals in the second deed may be considered surplusage, and if apt words are used, it will be sufficient to pass the title.⁵

quoted the maxim, *confirmatio est nulla ubi donum precedens est invalidum, et ubi donatio nulla est, nec valebit confirmatio*. An exception, and perhaps the only one to this rule, is where the confirmation is the act of the sovereign will: 3 Com. Dig. 139; *Blessing v. House*, 3 Gill & J. 290.

¹ *Branham v. San Jose*, 24 Cal. 585. See *Chess v. Chess*, 1 Pen. & W. 32; 21 Am. Dec. 350.

² *Love v. Shields*, 3 Yerg. 405; *Fauntleroy v. Dunn*, 3 Mon. B. 594. A party must have knowledge of his rights to make a confirmation valid; and when it appears that there was fraud in the transaction, he must in full cognizance of it intend to confirm the transaction to make his act effectual: See *Adlum v. Yard*, 1 Rawle, 171; 18 Am. Dec. 608; *Stroble v. Smith*, 8 Watts, 280.

³ *Barr v. Schroeder*, 32 Cal. 609.

⁴ *Smith v. Morse*, 2 Cal. 524. See *Wilkinson v. Leland*, 2 Peters, 672; *Satterlee v. Matthewson*, 2 Peters, 380; *Watson v. Mercer*, 8 Peters, 88.

⁵ *Barr v. Schroeder*, 32 Cal. 609.

§ 19. **Surrender.**—A surrender is the yielding up of an estate for life or years to him that has the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them.¹ At common law a surrender was of two sorts; the first by a surrender in deed or by express words in writing, where the words of the lessee to the lessor constitute a sufficient assent to give him his estate back again; and the second being a surrender in law, as if a lessee for life or years take a new lease of the same land during the term, this will be considered a surrender in law of the first lease.²

§ 20. **Assignment.**—In common language this term signifies the transfer of all kinds of property, real, personal, and mixed, and whether the same be in possession or in action as a general assignment. In a more technical sense, however, it is usually applied to the transfer of a term of years; but it is more particularly used to signify a transfer of some particular estate or interest in land.³ An assignment at common law was understood to be a parting with the whole property.⁴ When applied to a term of years it has the effect of substituting the assignee for the former lessee, and though he may not have entered on the land, of rendering him at once liable to all the obligations contained in the lease.⁵

§ 21. **Defeasance.**—A defeasance is an instrument which avoids or defeats the force or operation of some

¹ Scott's Exrs. v. Scott, 18 Gratt. 159. A surrender of a lease is the yielding up of the estate to the landlord so that the leasehold interest becomes extinct by mutual agreement between the parties: Martin v. Stearns, 52 Iowa, 347.

² See Jacob's Law Dict. tit. Surrender.

³ Ball v. Chadwick, 46 Ill. 31. It is the transferring and setting over to another of some right, title, or interest in things in which a third person, not a party to the assignment, has a concern and interest: Cowles v. Rickets, 1 Iowa, 585. Is the setting over or transferring the interest a man hath in anything to another: Perrine v. Little, 13 N. J. L. 248.

⁴ Potter v. Holland, 4 Blatchf. 210.

⁵ Deane's Princ. of Conv. 302. The idea of assignment is essentially that of a transfer by one existing party to another existing party, of some species of property or valuable interest: Hight v. Sackett, 34 N. Y. 451.

other deed; and that which in the *same* deed would be called condition, is when found in *another* deed called a defeasance. But to be operative it must contain proper words to defeat or put an end to the deed of which it is intended to be a defeasance; as that it shall be void or of no force or effect.¹ These instruments were generally used when mortgages were made, the mortgagor executing an absolute deed and the mortgagee giving back a deed of defeasance. But it is now the custom to insert the conveyance and all conditions to which it is subject in the *same* instrument, and hence the use of deeds of defeasance as separate acts has practically ceased.²

§ 22. **Deeds under the statute of uses.**—In addition to the deeds enumerated as existing at common law, there were other conveyances which derived their effect from the statute of uses. These included bargain and sale, covenant to stand seised, and lease and release. None of these required an actual livery of seisin, and while a seisin is considered requisite to make the conveyance effectual, the statute transfers this; that is, it executes the use by causing the union of the legal seisin with the equitable use, and the result is the creation of an entire legal estate from the two.³

§ 23. **Bargain and sale deeds.**—A bargain and sale is a real contract whereby a person bargains and sells his lands to another for a pecuniary condition, in consequence of which a use arises to the bargainee, and by the statute of uses the legal estate and actual possession are immediately transferred to the *cestui que use*, without any entry or other act on his part.⁴ In one case it has been expressed as “the transfer and delivery of personal or real property by one person to another, in con-

¹ Lippincott v. Tilton, 14 N. J. L. 364.

² Deane's Princ. of Conv. 304.

³ 3 Wash. Real Prop. 605.

⁴ Sifter v. Beales, 9 Serg. & R. 177. The statute thus dispenses with the necessity of livery of seisin: Chenery v. Stevens, 97 Mass. 77.

sideration of a price agreed upon between them, as the *value* of the property sold.”¹ To operate as a bargain and sale deed, a pecuniary consideration is necessary.² And this must be either expressed in the deed or proved independently of it. If one is expressed, proof of its actual payment is not required, nor can it be controverted by evidence; and though the amount be nominal merely, it is sufficient.³

¹ *Freeman v. Brittin*, 17 N. J. L. 191, 231. “A bargain and sale is when a recompense is given by both parties; as if a man bargains his land to another for money, here the land is a recompense to the one for the money, and the money is the recompense to the other for the land; and this is properly a bargain and sale”: *Sharington v. Shotton*, Plow. 303. “A real contract on a valuable consideration, for passing or transferring lands from one to another”: *Clarborne v. Henderson*, 3 Hen. & M. 349.

² *Corwin v. Corwin*, 6 N. Y. 342; 57 Am. Dec. 543; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62; *Cheney v. Watkins*, 1 Har. & J. 527; 2 Am. Dec. 530. In *Corwin v. Corwin*, *supra*, Johnson, J., speaking for the court, said: “There being neither delivery of seisin nor possession under the deed, the plaintiffs fail to make out a title, unless the deed can be sustained as a covenant to stand seised. It cannot operate in the first way, because it shows no pecuniary consideration; nor in the second, because affinity by marriage is not a consideration on which a covenant to stand seised can be maintained. Of course I do not speak of a deed in consideration of marriage properly speaking, viz., of marriage to be had. This is a valuable consideration.” In *Wood v. Chapin*, *supra*, Denio, C. J., said: “A bargain and sale before the statute of uses rested on the goodness of the consideration, and hence it was that a consideration became the great point which deeds of conveyance turned, which were invented after statute, in order to raise and convey uses”: See *Jackson v. Cadwell*, 1 Cowen, 622, 639; *Jackson v. McKenny*, 3 Wend. 233; 20 Am. Dec. 690.

³ *Jackson v. Alexander*, 3 Johns. 484; 3 Am. Dec. 517; *Wood v. Chapin*, 13 N. Y. 509, 517; 67 Am. Dec. 62; *Jackson v. Fish*, 10 Johns. 456; *Jackson v. Florence*, 16 Johns. 47; *Jackson v. Sebring*, 16 Johns. 515; 8 Am. Dec. 357; *Jackson v. Root*, 18 Johns. 60. This is the rule declared in *Okison v. Patterson*, 1 Watts & S. 395, where it is said: “To raise a use by a deed of bargain and sale, a valuable consideration must be expressed; but as the smallest is sufficient, the amount of it need not be stated. Thus was the law held in *Jackson v. Alexander*, 3 Johns. 478; 3 Am. Dec. 517; *Jackson v. Root*, 18 Johns. 60; though it was ruled differently in *Singleton v. Bremer*, 4 McCord, 12; 17 Am. Dec. 699; and though the point was decided in *Jackson v. Alexander*, by a divided court, yet the masterly opinion of the majority, delivered by Chief Justice Kent, seems to have put the decision on unshaken ground, that the rule requiring a consideration has become a matter of senseless form, a pepper-

But any consideration that is valuable, it has been held, is sufficient.¹ As to the form of conveyances of this character, it is held that any writing containing a sufficient identification of the parties, a proper description of the land, an acknowledgment of a sale in fee of the vendor's right, for a valuable consideration, and that is signed and sealed by the grantor and duly attested, when necessary, is a good deed of bargain and sale.²

corn being sufficient; that where a sum of money is stated, it is never a matter of inquiry whether it was paid; and that since the substance is so entirely gone, the policy of giving effect to contracts, requires us to construe the cases which have modified the rule with the utmost liberality. By any other construction, the omission of a useless expression by the inadvertence or unskillfulness of the scrivener, would be suffered to destroy many a title and defeat many a fair conveyance for the sake of what, if it ever had any good in it, was at first an innovation on the common law borrowed from the chancery notion of requiring a consideration in every contract, whether sealed or not, and which has dwindled to a shadow": See *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 431.

¹ *Jackson v. Leek*, 19 Wend. 339; *Springs v. Hanks*, 5 Ired. 30; *Wood v. Beach*, 7 Vt. 522; *Busey v. Reese*, 38 Md. 264. A consideration, it has been held in Missouri, Illinois, and Tennessee, is not necessary: *Perry v. Price*, 1 Mo. 553; *Fetrow v. Merriwether*, 53 Ill. 275; *Jackson v. Dillon*, 2 Over. 261. A deed that expresses a pecuniary consideration, and manifestly intends to transfer *in presenti* all the estate of the grantor, though it may not be good as a deed of lease and release, nor, for want of a proper consideration, as a covenant to stand seised to uses, will be considered, notwithstanding the words "remise, release, and quitclaim," good as a deed of bargain and sale: *Lynch v. Livingston*, 8 Barb. 463.

² *Chiles v. Conley's Heirs*, 2 Dana, 21. In that case the conveyance was in the following form: "For value received, I bargain and sell unto Arthur Conley my whole right of improvement made by John Brown, and all the land as far as Thomas Miller's claim interferes with my claim. Given under my hand and seal this 7th day of February, 1806. William Bridges. [Seal.] Test., Thomas Boyd, John Robinson." Chief Justice Robertson, in delivering the opinion of the court, remarked: "The literal import of this writing is that of an executed agreement or a conveyance of the title which the vendor held. It contains all the essential requisites of a conveyance in fee simple. It is informal and unusually summary, when compared with the redundant, quaint, and prolix system of modern conveyances by deed. But it is not more laconic or less comprehensive than the ancient Saxon deeds, and it is almost as formal and elaborate as the antiquated charters of enfeoffment; and indeed its form and style are, in some respects, preferable to the repletion and repetitions which unnecessarily charac-

§ 24. **Covenant to stand seised to uses.**—This conveyance required a consideration of blood or marriage, and was a covenant by which a man seised of lands covenanted in consideration of blood or marriage that he would stand seised of the same to the use of his child, wife, or kinsman, for life, in tail, or in fee.¹ In New York, it is held that a consideration of blood or marriage is indispensably necessary to the validity of a covenant to stand seised;² and the same rule prevails in New Hampshire.³ But in Massachusetts the rule is established that

terize and greatly deform modern deeds of conveyance. It is sealed and signed and attested properly; it shows a valuable consideration; it identifies the parties, describes the land, and acknowledges an absolute executed sale in fee of the vendor's right. These constitute a deed of conveyance, and therefore, as this instrument contains no provision or intimation to the contrary, this court cannot by any allowable process of interpretation, give to it any other character or effect than those of a deed of bargain and sale." For the purpose of preventing secret conveyances and to give the notoriety furnished by the common-law assurances, it was enacted that conveyances by bargain and sale would not inure to pass a freehold interest unless made by indenture and enrolled within six months after execution: 27 Hen. VIII. ch. 16.

¹ 2 Blackst. Com. 338. See, also, *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706; *Rollins v. Riley*, 44 N. H. 9; *Cheney v. Watkins*, 1 Har. & J. 527; 2 Am. Dec. 530. The statute executes the use, and Blackstone remarks: "The party intended to be benefited having thus acquired the use, is thereby at once put into corporeal possession of the land without ever seeing it, by a kind of parliamentary logic:" 2 Blackst. Com. 338.

² *Jackson v. Sebring*, 16 Johns. 515; 8 Am. Dec. 357; *Jackson v. Cadwell*, 1 Cowen, 622; *Jackson v. Delancey*, 4 Cowen, 427.

³ *French v. French*, 3 N. H. 234; *Underwood v. Campbell*, 14 N. H. 393; *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706. In *Jackson v. Sebring*, 16 Johns. 515, 8 Am. Dec. 357, the following language appears: "A covenant to stand seised is a peculiar species of conveyance, confined entirely to family connections and founded on the tender considerations of blood or marriage. No use can be raised for any purpose in favor of a person not within the influence of that consideration. There is no cold, selfish, calculating motive to contaminate the contract, nor is the conveyance to be profaned by the footsteps of a stranger." The Supreme Court of Massachusetts, commenting on this language, says in *Trafton v. Hawes*, cited in the following note: "The law does indeed recognize the natural affections, and the mutual obligation of support which springs from the family relations, as affording a good and meritorious consideration, sufficient for a deed of conveyance. But that a form of conveyance should be so consecrated by a mere sentiment that it cannot

so far as the validity of a covenant to stand seised, requiring a consideration of blood or marriage, is concerned, the distinction between this conveyance and a deed of bargain and sale is artificial and constructive, depending entirely upon the statute of enrollments, and that it could have no pretext for a continued existence where the provisions of that statute do not apply. Accordingly, in that State, a deed of land to take effect at the grantor's death, though there may be no relationship between the parties by blood or marriage, will be held good as a covenant to stand seised to the grantee's use.¹ Conveyances

be permitted to operate between any parties other than relatives, nor upon a pecuniary consideration, would be an anomaly of which the law should not be suspected upon slight grounds. Upon every principle of the law of contracts, money is a sufficient consideration for the support of any contract whatever, so far as its validity depends upon a consideration as such." *Emery v. Chase*, 5 Greenl. 232; *Gault v. Hall*, 26 Me. 561.

¹ *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494, where Wells, J., in delivering the opinion of the court, says: "The English statute of enrollments has no application to this country. In Massachusetts, all deeds of lands are required to be recorded alike. A deed of itself imports a consideration. The recital of a consideration is conclusive for the purpose of supporting the deed against the grantor and his heirs. A voluntary conveyance or gift to a stranger is good against the grantor and his heirs. It is also good against a subsequent purchaser for value, in the absence of actual fraud: *Beal v. Warren*, 2 Gray, 447. The reason for distinguishing between a deed of bargain and sale and a covenant to stand seised, on the ground of the nature of the consideration, does not exist here. Between the grantor and his heirs and the grantee, in a controversy respecting the title, there is no question open in relation to the nature or existence of the consideration, unless it be in connection with a charge of fraud in procuring the execution of the deed. It is the duty of the court to seek by construction to maintain rather than to defeat the operation of the deed. In case of a deed to take effect at the decease of the grantor, there being nothing to the contrary in the statutes or in the rules of law applicable to this commonwealth, it is the duty of the court, in accordance with the foregoing principles of construction, to give to the deed its intended operation by construing it as a covenant to stand seised to the use of the grantee, according to the nature of the use granted. The deed in the present case may therefore be properly maintained as a covenant to stand seised, notwithstanding the absence of the relation of blood or marriage between the grantor and grantee." See *Welsh v. Foster*, 12 Mass. 93; *Parker v. Nichols*, 7 Pick. 111; *Gale v. Coburn*, 18 Pick. 397; *Miller v. Goodwin*, 8 Gray, 542.

of this character are now no longer used, but the rules pertaining to them are still retained and enforced by the courts to effectuate the intention of parties who attempt to convey land by deeds, which cannot pass title in the manner proposed from their insufficiency under the law governing other forms of transfer.¹

§ 25. **Lease and release.**—It has been remarked, that conveyances by bargain and sale in order to pass a freehold were required to be enrolled; but the statute of enrollments did not apply to a bargain and sale of chattel interests, either because they were not considered of sufficient importance, or from an oversight in the framing of the statute. For the purpose of avoiding the notoriety which the statute was intended to give, advantage was taken of this omission, to invent an assurance in which enrollment was not necessary. This assurance, by lease and release as it was termed, consisted of an instrument declaring that the vendor had bargained and sold the land, for a nominal consideration, to the purchaser for one year, to begin from the day before the date of the deed, and of a second deed, which followed the first, releasing the reversion to him. This put him into possession of the whole estate, and hence a conveyance of this character was said to be tantamount to a feoffment.² When the lessee was in the possession of the land, the remainder of the estate might be conveyed to him without livery of seisin; and by a bargain and sale for a valuable consideration, a use was raised in the bargainee

¹ See *Exum v. Canty*, 34 Miss. 569; *Fisher v. Strickler*, 10 Pa. St. 348; 51 Am. Dec. 488; *Horton v. Sledge*, 29 Ala. 478; *Jackson v. Staats*, 11 Johns. 337; 6 Am. Dec. 376; *Barrett v. French*, 1 Conn. 354; 6 Am. Dec. 241; *Jackson v. McKenny*, 3 Wend. 233; 20 Am. Dec. 690; *Van Horn v. Harrison*, 1 Dall. 137; 1 Am. Dec. 229; *Rogers v. Eagle Fire Co.*, 9 Wend. 611; *Wall v. Wall*, 30 Miss. 92; 64 Am. Dec. 147; *Eckman v. Eckman*, 68 Pa. St. 460; *Jackson v. Swart*, 20 Johns. 84; *Davenport v. Wynne*, 6 Ired. 128; 44 Am. Dec. 70; *Brewer v. Hardy*, 22 Pick. 376; 33 Am. Dec. 747; *Chancellor v. Wyndham*, 1 Rich. 161; 42 Am. Dec. 411; *Bank v. Houseman*, 6 Paige, 526; *Wallis v. Wallis*, 4 Mass. 135; 3 Am. Dec. 210; *Cobb v. Hines*, Busb. 343; 59 Am. Dec. 559.

² *Deane on Conveyancing*, 308, 309; *Co. Litt.* 270; 2 *Blackst. Com.* 339.

which by the statute was transferred into actual possession.¹

§ 26. Fine and recovery.—Another assurance that may be mentioned was that by fine and recovery, which was a method of barring an estate tail, and converting it into a fee simple. This was done by a fictitious suit between the tenant in tail as defendant, and an amicable plaintiff, which resulted in a declaration that the latter was the owner in fee simple of the land, and in giving the owner full power of alienation over it. By the statute of uses, a fine and recovery might constitute a conveyance to uses, if a declaration to that effect was properly made.²

§ 27. Quitclaim deeds.—Deeds of this character now common in the United States, are similar to the old deeds of release, with the exception that the latter were effectual at common law, strictly speaking, only in favor of a person who had possession of the land, or held some interest in it.³ A quitclaim deed purports to release and

¹ Until the Statute of 8 and 9 Vict. 106, the use of this form of conveyance was very common in England. In the United States its use has been rare: *Craig v. Penson*, 1 Cheves, 272. In *Lewis' Lessee v. Beall*, 4 Har. & McH. 488, the point saved was: "Whether a person having a seisin in law, but never in actual possession of lands in fee, whereof no person whatever hath the actual possession at the time of conveyance, can for a valuable consideration convey the same by lease and release? If in the affirmative, judgment to be entered for the plaintiff; if in the negative, for the defendant." The court gave judgment on the point, and verdict saved for the plaintiff.

² In England, this mode of conveyance no longer exists, and it never obtained to any degree in this country: But see *Richman v. Lippincott*, 29 N. J. L. 44; *McGregor v. Comstock*, 17 N. Y. 162; *Croxall v. Shered*, 5 Wall. 268; *Moreau v. Detchemendy*, 18 Mo. 527; 2 Wash. Real Prop. (4th ed.) 423.

³ *Kyle v. Kavanagh*, 103 Mass. 356; 4 Am. Rep. 560; *Rowe v. Beckett*, 30 Ind. 154; 95 Am. Dec. 676; *Ely v. Stannard*, 44 Conn. 529; *Kerr v. Freeman*, 33 Miss. 292. In *Kyle v. Kavanagh*, *supra*, it is said: "A deed of quitclaim passes all the estate which the grantor could convey by deed of bargain and sale. If a grantor has in fact a good title, his deed of quitclaim conveys his title and estate as effectually as a deed of warranty. An agreement or covenant to convey a good title, therefore, does not necessarily entitle the covenantee to a warranty deed; the right of property and of exclusive possession, which constitutes a good title,

quitclaim only whatever interest the grantor possesses at the time. By the use of this form of conveyance he does not thereby affirm the possession of any title, and is not precluded from subsequently acquiring a valid title, and from attempting to enforce it; and conversely, a grantee in a quitclaim deed may deny that he received any estate by the deed.¹ The operative words of release in a simple quitclaim deed are "remise, release, and quitclaim"; and when the words "bargain, sell, and quitclaim" are used, their effect is not only to release, but also to transfer whatever interest the grantor possesses at the time of the execution of the deed.² In California, where a town, as the successor in interest of a Mexican pueblo, becomes the owner of the pueblo lands within the town limits, and its board of trustees grant a block of

being effectually vested in him by a deed of quitclaim": *Gazley v. Price*, 16 Johns. 267; *Ketchum v. Everson*, 13 Johns. 359; *Potter v. Tuttle*, 22 Conn. 512. "In this case, it should have been left to the jury to determine what the contract between the parties was, with instructions that if the entire contract was that the plaintiff should give the defendant a good title by conveyance from Jackson, there being no agreement as to the form of the deed, then the delivery to the defendant of the deed of quitclaim was a compliance with the contract on the part of the plaintiff." A quitclaim deed is as effectual to convey land as a deed with full covenants: *McConnell v. Reed*, 4 Scam. 117; 38 Am. Dec. 124; *Hamilton v. Doolittle*, 37 Ill. 478.

¹ *San Francisco v. Lawton*, 18 Cal. 465. See, also, *Cadiz v. Majors*, 33 Cal. 288; *Gee v. Moore*, 14 Cal. 472; *Morrison v. Wilson*, 30 Cal. 344; *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89; *Simpson v. Greeley*, 8 Kan. 586; *Scoffins v. Grandstaff*, 12 Kan. 469; *Ott v. Sprague*, 27 Kan. 624; *Bruce v. Luke*, 9 Kan. 201; 12 Am. Rep. 491; *Young v. Clippinger*, 14 Kan. 148.

² *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108. A quitclaim deed will enable the grantee to maintain ejectment for the land it conveys, if his grantor could have done so: *Sullivan v. Davis*, 4 Cal. 291; *Downer v. Smith*, 24 Cal. 114. A title may be passed as effectually by a quitclaim deed as by any other form: *Bayer v. Cockerill*, 3 Kan. 282; *Hall v. Ashby*, 9 Ohio, 96; 34 Am. Dec. 424; *Hunt v. Hunt*, 14 Pick. 374; 25 Am. Dec. 400; *Rogers v. Hillhouse*, 3 Conn. 398; *Kerr v. Freeman* 33 Miss. 292; *McConnel v. Reed*, 4 Scam. 117; 38 Am. Dec. 124; *Hamilton v. Doolittle*, 37 Ill. 473, 482; *Platt v. Brown*, 30 Conn. 336; *Smith v. Pendell*, 19 Conn. 107; 48 Am. Dec. 146; *Young v. Clippinger*, 14 Kan. 148; *Carpentier v. Williamson*, 25 Cal. 154; *Thompson v. Spencer*, 50 Cal. 532.

such land to a person petitioning for the same, and he then transfers the same by a quitclaim deed, and the board of trustees subsequently make a conveyance to the grantor, the grantee under the quitclaim deed, it is held, acquires the title to the land as against a subsequent purchaser from the grantor. The deed of the board of trustees is considered as dating back to the date of the grant.¹ Where a deed, instead of conveying the land generally, purports to convey only the right, title, claim and interest of the grantor to the land, a general covenant of warranty contained in the deed is confined in its legal effect to such title, and the assertion or enforcement of a paramount title outstanding against the grantor at the time of the execution of the deed cannot operate as a breach of the covenant.²

¹ *Thompson v. Spencer*, 50 Cal. 532. See, also, *Frey v. Clifford*, 44 Cal. 335; *Graff v. Middleton*, 43 Cal. 341; *Morrison v. Wilson*, 30 Cal. 344; *Carpentier v. Williamson*, 25 Cal. 154; *Board of Education v. Fowler*, 19 Cal. 11; *Sullivan v. Davis*, 4 Cal. 291; *Downer v. Smith*, 24 Cal. 114; *Quivey v. Baker*, 37 Cal. 465; *Crane v. Salmon*, 41 Cal. 63.

² *Reynolds v. Shaver*, 59 Ark. 299; 43 Am. St. Rep. 36. See, also, sec. 931, *post*. Unless the deed manifests a different intention, a quitclaim deed conveys all the grantor's interest in the land conveyed: *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243; *Utley v. Fee*, 33 Kan. 683. A quitclaim deed will enable the grantee to take advantage of such covenants of former grantors as run with the land: *Scoffins v. Grandstaff*, 12 Kan. 467. Whether one claiming under a quitclaim deed can be an innocent purchaser: See *Hockenhull v. Oliver*, 80 Ga. 89; 12 Am. St. Rep. 235; *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243; *Taylor v. Harrison*, 47 Tex. 454; 26 Am. Rep. 304; *Brown v. Banner etc. Co.*, 97 Ill. 214; 37 Am. Rep. 105; *Thorn v. Neusom*, 64 Tex. 161; 53 Am. Rep. 747; *Fox v. Hull*, 74 Mo. 315; 41 Am. Rep. 316; *Cutler v. James*, 64 Wis. 173; 54 Am. Rep. 603.

The words, "remise, release, and forever quitclaim," employed in a deed, are sufficient to convey whatever title the grantor had at the time of delivery: *Wilson v. Albert*, 89 Mo. 537. A grantor owning an undivided four-fifths of a tract of land and conveying a "full half interest in all the right, title, and interest in and to" the land, conveys an undivided half interest in the land, and not in grantor's interest: *Cocks v. Simmons*, 55 Ark. 104; 29 Am. St. Rep. 28. Where defendants' grantor executes an instrument releasing and quitclaiming to defendant land for which he held only a school-land certificate of purchase, and by which he further agrees to perfect his title and make defendant a good deed, the instrument is a quitclaim deed and conveys all the grantor's

interest, and the agreement for a subsequent deed is only a covenant of further assurance: *Wholey v. Cavanaugh*, 88 Cal. 132. Where a grantee takes a quitclaim deed with notice that a part of the land is occupied by a third person, he takes the property as it was at the time of his purchase, and he is not entitled to a deduction from the price: *Shackleford v. Wright* (Ky. May 7, 1891,) 16 S.W. 268. Where a person paid to an executor about one-fortieth of the value of a tract of land, and in consideration therefor procured from him a quitclaim deed for such land, although the executor, as such, had no power to sell or convey the land, or to execute any kind of deed therefor, and no fraud, mistake, or accident occurred or intervened, and it was not the intention that any interest in the land, except such as the executor, as such, had power to convey, should pass to the grantee by such deed, no title in or to the land passed to the grantee by the deed, or by way of estoppel, ratification, or otherwise, although the executor may at the time of the execution of the deed, or afterward, have had some interest in the property as heir or devisee: *Price v. King*, 44 Kan. 639.

CHAPTER III.

WHAT MUST PASS BY DEED, OR BY WRITING.

- § 28. General comments.
- § 29. Equitable interests in land.
- § 30. Partnership to buy contracts for sale of land.
- § 31. Compensation for wrongfully obtaining patent.
- § 32. Rule as to mining claims.
- § 33. Statutory regulation.
- § 34. Right to carry away ore.
- § 35. Right to dower an interest in land.
- § 36. Pews.
- § 37. Fixtures.
- § 38. Possession is an interest concerning land.
- § 39. Stock in corporations.
- § 40. Interest of execution purchaser.
- § 41. Contract for board and lodging.
- § 42. Equity of redemption.
- § 43. Improvements upon land.
- § 44. Qualification or enlargement of interests already acquired.
- § 45. Revival of void contract.
- § 46. Revival of satisfied mortgage.
- § 47. Agreement for execution of covenant to convey.
- § 48. Executory agreement for creation of lease.
- § 49. Lands owned in partnership.
- § 50. Parol proof of partnership in land.
- § 51. Same subject—Rule in various States.
- § 52. Agreements to establish title to land.
- § 53. Release of damages affecting land.
- § 54. Agreements to devise interests in land.
- § 55. Application of rules relative to specific performance.
- § 56. Parol evidence.
- § 57. Growing crops.
- § 58. Occupancy of the land.
- § 59. Distinction between *fructus industriales* and *prima vestura*.
- § 60. This distinction in New York.
- § 61. Other States.
- § 62. Opposite view—Where this distinction is not observed.
- § 63. Easements are interests in land.

§ 28. General comments.—Before the passage of the statute of frauds, as we have seen, a freehold might be

conveyed without a deed; but incorporeal hereditaments, which were said to lie in grant, required for their conveyance a written instrument. This distinction was never observed in this country, and no longer practically exists in England.¹ A deed in all cases is now required to convey "lands, tenements, and hereditaments, or any interest in or concerning them"; and the question to be considered is, What is such an interest, for the transfer of which a deed or written instrument is necessary? While the laws of Mexico were in force in California, a parol sale of land if only executed was valid and the vendee obtained the title.²

§ 29. Equitable interests in land.—That equitable interests in land can be conveyed only by deed or writing was determined at an early day. Thus in one case, a plaintiff contracted with an owner of land for its purchase at a certain sum, paying a part of the consideration and taking an obligation for conveyance upon the payment of the residue of the purchase money. Afterward a third person by parol agreed to purchase the plaintiff's interest in the contract, and the latter by indorsement on his obligation directed the owner to convey to the former. The court held the contract was for a conveyance of an interest in lands and was therefore void.³

¹ See Statute of 8 and 9 Vict. ch. 106.

² *Hall v. Yoell*, 45 Cal. 584; *Cook v. Frink*, 44 Cal. 331; *Long v. Dollarhide*, 24 Cal. 218.

³ *Sims v. Killian*, 12 Ired. 252; *Holmes v. Holmes*, 86 N. C. 205. In the former case, Ruffin, C. J., said: "The contract concerns the sale of an interest in land, and by the statute of frauds a party to it cannot be charged therewith unless it be in writing and signed by the party thus sought to be charged. It was argued at the bar that the policy of the act was to protect owners of real estate from being deprived of it without written evidence under their own hand, and that a promise to pay money for land is not within the mischief. But the danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of land. Hence, the act in terms avoids entirely every contract of which the sale of land is the subject in respect of a party, that is, either party who does not charge himself by his signature to it after it has been reduced to writ-

§ 30. Partnership to buy contracts for the sale of lands.—A partnership to buy contracts for the sale of lands is deemed to be a partnership for the purchase of an equitable interest in lands, and is required to be in writing.¹ In such a case, Justice Story remarked: "A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very lands, and makes the vendee a trustee for him. A contract for the sale of an equitable estate in lands, whether it be under a contract for the conveyance by a third person or otherwise, is clearly a sale of an interest in the lands within the statute of frauds."² But this case, in so far as it decides that a partnership for the sale of lands is required to be in writing, is not in accord with the modern decisions which announce a contrary doctrine.³

§ 31. Compensation for wrongfully obtaining patent. So a promise to compensate a plaintiff in money for an injury occasioned by the misconduct of the defendant in obtaining a patent in his own name, for land for which he ought to have procured a patent in the name of the plaintiff, and in preventing the plaintiff from securing a patent in his own name, and in consideration of the defendant having procured the issuance of a patent to himself, is a contract affecting lands, and must be in writing.⁴

§ 32. Rule as to mining claims.—In California, the question arose at an early day, whether an instrument in

ing": And see, *Hoen v. Simons*, 1 Cal. 119; 52 Am. Dec. 291; *Millard v. Hathaway*, 27 Cal. 119; *Videau v. Griffin*, 21 Cal. 389; *McLaren v. Hutchinson*, 22 Cal. 187; 83 Am. Dec. 59; *Tohler v. Folsom*, 1 Cal. 207; *Bayles v. Baxter*, 22 Cal. 575; *Dickenson v. Mays*, 60 Miss. 388; *Kelley v. Stanbery*, 13 Ohio, 426; *Junkins v. Lovelace*, 72 Ala. 303; *Van Keuren v. McLaughlin*, 19 N. J. Eq. 187; *Scott v. McFarland*, 13 Mass. 309; *Odell v. Montross*, 68 N. Y. 499; *Clark v. Condit*, 18 N. J. Eq. 358.

¹ *Parsons v. Phelan*, 134 Mass. 109.

² *Smith v. Burnham*, 3 Sum. 435, 461.

³ See §§ 49, 50, 51, *post*.

⁴ *Hughes v. Moore*, 7 Cranch, 176. See *Toppin v. Lomas*, 16 Com. B. 145; *Richards v. Richards*, 9 Gray, 313.

writing was necessary for the conveyance of a right to a mining claim. In one of the first cases in which the courts were called upon to consider the nature of these claims, the following language was used: "Courts are bound to take notice of the political and social condition of the country, which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*."¹ In one case, it was held that a bill of sale was insufficient to convey a mining claim.² In another, it was held that mining claims were real estate within the meaning of the practice act, relating to the venue of civil actions.³ Afterward, the suggestion was made that title to a mining claim would pass by a verbal sale, if accompanied by an actual transfer of possession to the vendee or purchaser.⁴ And finally it was decided, that the right to mining ground was acquired by appropriation and rested upon possession only; that it did not amount to an inter-

¹ *Irwin v. Phillips*, 5 Cal. 140, 146; 63 Am. Dec. 113.

² *Hayes v. Bona*, 7 Cal. 153.

³ *Watts v. White*, 13 Cal. 321. In *Merritt v. Judd*, 14 Cal. 59, claims to public mineral lands were recognized as titles, as legal estates of freehold for all practical purposes, and it was held that a fixture might exist on public land: See *Gore v. McBrayer*, 18 Cal. 582.

⁴ *Jackson v. Feather River Co.*, 14 Cal. 18.

est in the land, and hence a transfer of possession was a sufficient conveyance.¹ In a subsequent decision, the rule laid down in the case last cited was held to apply only to cases in which the grantor was in actual possession, and had the power of delivering possession to the grantee, and that it did not govern cases where the claim at the time of the sale was in the possession of adverse parties. In cases of this character a written conveyance was deemed necessary.²

§ 33. **Statutory regulation.**—A statute was then passed which provided that conveyances of mining claims might be evidenced by bills of sale or instruments in writing not under seal.³ Under this statute, it was considered *argu-*

¹ Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198; Gatewood v. McLaughlin, 23 Cal. 178. The court in the first case said: "The court considered a conveyance from the company necessary to invest the plaintiff with their rights, and the evidence was stricken out on the ground that no conveyance had been shown. We are of opinion that the court erred in this respect, and that a conveyance by deed would have passed no greater interest than the plaintiff acquired by a transfer of the possession. Rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance other than a transfer of possession is necessary to pass them. The rights of the company were of this character, and the transfer of possession was as effectual for the purpose intended, as if it had been accompanied by a conveyance in writing. The plaintiff was put in possession as the successor in interest of the company, and the intention undoubtedly was that whatever rights the company had should pass with the possession. There was no reservation in that respect; and the only rational theory upon the subject is, that the plaintiff was to take the place of the company and stand in the same position with regard to the claim": See, also, Gore v. McBrayer, 18 Cal. 583.

² Copper Hill Mining Co. v. Spencer, 25 Cal. 18.

³ Stats. Cal. 1860, p. 175. The following is the language of the statute so far as applicable to this question: "Conveyances of mining claims may be evidenced by bills of sale or instruments in writing not under seal, signed by the person from whom the estate or interest is intended to pass, in the presence of one or more attesting witnesses; and also all conveyances of mining claims heretofore made by bills of sale or instruments in writing not under seal, shall have the same force and effect as *prima facie* evidence of sale, as if such conveyances had been made by deed under seal; *provided*, that nothing in this act shall be construed to interfere with or repeal any lawful, local rules, regulations, or customs of the mines in the several mining districts of this state; and *provided*

endo in one case, that this provision of the statute was mandatory, and that it was intended that the conveyance of mining claims by parol should be excluded, even though accompanied by a delivery of possession;¹ and later, this construction of the statute was expressly adopted.² Accordingly it was held, that where an agreement in writing was made to convey to a party an undivided interest in a mining claim, upon the fulfillment of certain conditions, and to let such party into possession, ejectment would not lie; but the proper remedy was an action for specific performance, and a delivery of the possession as incidental to the relief.³ The form of the conveyance is immaterial, if it be clear from the language used that the maker of the instrument intended to pass the title to the property, and this intent will, if necessary, be effectuated by construction.⁴ Under the code, a gold mine is considered to be real estate, and therefore no interest therein, other than an estate at will or for a term not exceeding one year, can be transferred except by an instrument in writing.⁵

further, every such bill of sale or instrument in writing shall be deemed and held to be fraudulent and void, as against all persons except the parties thereto, unless such bill of sale or instrument in writing be accompanied by an immediate delivery to the purchaser of the possession of the mining claim or claims therein described, and be followed by an actual and continued change of the possession thereof, or unless such bill of sale or instrument in writing shall be acknowledged or recorded as required by law in the case of conveyances of real estate." A subsequent section confined the application of the statute to gold mining claims.

¹ *Patterson v. Keystone Mining Co.*, 30 Cal. 360.

² *Goller v. Fett*, 30 Cal. 481; *King v. Randlett*, 33 Cal. 318. See *Hardenbergh v. Bacon*, 33 Cal. 381.

³ *Felger v. Coward*, 35 Cal. 650.

⁴ *Meyers v. Farquharson*, 46 Cal. 190. The court held that a conveyance of land was not void on its face for uncertainty in the description of the property, if the description itself showed the points named as boundaries to be well-known monuments easily found, and that a bill of sale of a mining claim is not to be rejected as evidence because it was a gift.

⁵ Civ. Code Cal., § 1091; *Melton v. Lambard*, 51 Cal. 258. The owner of an undivided interest in a mining claim is entitled to the entire possession against one having no title to any portion of it: *Melton v. Lambard*, 51 Cal. 258.

§ 34. **Right to carry away ore.**—In Alabama, it is held that an easement is created by the grant of a right to dig and carry away ore from a mine, and that a contract for the sale of this right, which is an incorporeal hereditament, must be in writing. A license, however, may be conferred by a verbal contract, and this license, as long as it remains unrevoked, will afford protection from trespass, and vest in the party to whom it is given the property in the ore actually taken out, in reliance upon the permission.¹

§ 35. **Right to dower an interest in land.**—The right that a widow possesses to dower upon her husband's death, is such an interest in land that it cannot be released or waived by parol.² Thus, a verbal agreement by a widow made prior to the sale of certain lands of her late husband at probate, with one who became a purchaser, that if a certain sum was bid for the premises she would waive her right of dower, is void because not in writing.³ And so a promise by parol made by a vendor during the pendency of negotiations between him and a purchaser, to procure a relinquishment of the right of the former's wife to dower, is void for the same reason.⁴ In Wisconsin, it is held that an inchoate right of dower is such an interest in land that an action may be maintained by a wife for the purpose of establishing such contingent right, and of removing a cloud fraudulently attempted to be created upon it.⁵ An assignment of dower, however, may be

¹ *Riddle v. Brown*, 20 Ala. 412; 56 Am. Dec. 202.

² *Lothrop v. Foster*, 51 Me. 367.

³ *Wright v. De Groff*, 14 Mich. 164. See, also, *Gordon v. Gordon*, 56 N. H. 170; *Martin v. Wharton*, 38 Ala. 637; *Madigan v. Walsh*, 22 Wis. 501; *Brown v. Rawlings*, 72 Ind. 505; *White v. White*, 16 N. J. L. 202; 31 Am. Dec. 202; *Hall v. Hall*, 2 McCord Ch. (S. C.) 269; *Finney v. Finney*, 1 Wils. 34; *Keeler v. Tatnell*, 23 N. J. L. 62; *Wright v. De Groff*, 14 Mich. 164. An agreement on the part of a husband to convey community real estate to his wife in lieu of her separate real estate conveyed to a stranger must be in writing: *Churchill v. Stevenson*, 45 Pac. Rep. 28.

⁴ *Martin v. Wharton*, 38 Ala. 637. See *Chiles v. Woodson*, 2 Bibb, 71; *Campbell v. Taul*, 3 Yerg. 548, 557.

⁵ *Madigan v. Walsh*, 22 Wis. 501. But see *Van Cleave v. Wilson*, 15 Rep. 202; *Dooley v. Villalonga*, 61 Ala. 129; *Long v. Mostyn*, 65 Ala. 543;

made by parol, as the estate is not created, but only ascertained by an assignment.¹ The rule requiring an instrument in writing extends also to an agreement between husband and wife to compensate her for consenting to a relinquishment of her dower.²

§ 36. **Pews.**—Pews are sometimes treated as real estate and sometimes as personalty. Where considered as realty, they can be transferred only by a written instrument executed in the manner provided for the transfer of real estate.³ Therefore a levy of execution upon a pew, where the pew is considered as real estate, will transfer a title which at law will prevail over an earlier assignment of a certificate of the pew, although a record of the assignment was made by the clerk of the society by which the house had been built and occupied, in compliance with the by-laws of the society which provided for a transfer of pews in that manner.⁴

§ 37. **Fixtures.**—Concerning such improvements as are incorporated with the land and inseparable from it,

Fellows v. Lewis, 56 Ala. 343; *Jones v. De Graffenreid*, 60 Ala. 145; *Holly v. Flournoy*, 54 Ala. 99.

¹ *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263. In that case Mr. Justice Scott, in delivering the opinion of the court, said: "The objection the agreement was not in writing, and therefore within the statute of frauds, is not well taken. Treating it as an assignment of dower it was valid, though existing in parol. Bainbridge, in his work on Mines, says: 'Dower may be assigned by parol, notwithstanding the statute of frauds, for her estate is not created, but only ascertained, by assignment, and where she has entered after assignment, the freehold vests in her without the livery of seisin, whether the assignment has been accomplished by agreement or by the course of the law': Bainbridge on Mines, 149. See, also, *Conant v. Little*, 1 Pick. 189; *Jones v. Brewer*, 1 Pick. 314; *Baker v. Baker*, 4 Greenl. 668; *Pinkham v. Gear*, 3 N. H. 163; *Shattuck v. Gragg*, 23 Pick. 88; *Johnson v. Neil*, 4 Ala. 166.

² *Hall v. Hall*, 2 McCord Ch. 269. See, also, *Finney v. Finney*, 1 Wils. 134; *White v. White*, 16 N. J. L. 202; 31 Am. Dec. 232; *Keeler v. Tatnell*, 23 N. J. L. 62; *Shotwell v. Sedam*, 3 Ohio, 5; *Gordon v. Gordon*, 56 N. H. 170.

³ *Vielie v. Osgood*, 8 Barb. 130; *Baptist Church of Ithaca v. Bigelow*, 16 Wend. 28; *Barnard v. Whipple*, 29 Vt. 401; 70 Am. Dec. 422; *Bates v. Sparrell*, 10 Mass. 323; *Kellogg v. Dickinson*, 18 Vt. 266; *Hodges v. Green*, 28 Vt. 358.

⁴ *Barnard v. Whipple*, 29 Vt. 401; 70 Am. Dec. 422.

there may be some doubt as to whether a writing is required for their transfer. But, whatever doubt may exist as to the rule concerning improvements of this character, it is firmly settled that fixtures which are only annexed to the freehold may be sold without deed.¹ Upon no other branch of the law, perhaps, has there been a greater contrariety in the decisions than in those determining what is or is not a fixture. So, on the subject we are now considering, there is, to some extent, the same disagreement. In one case, for instance, it is held that where a house situated on the land of a third person has been sold and delivered, the seller may recover the price on the common counts for goods sold and delivered;² while, in another case, it is held that a contract for the sale of bricks, the debris of a house that had been burned, was a contract for the sale of an interest in land.³ But, as shown in a following section, improvements, including fixtures necessarily, may be sold without deed, and this must be regarded as the established rule.⁴

§ 38. Possession is an interest concerning land.—“Possession is *prima facie* evidence of title, and no title is complete without it,” is the language used by the court in New York.⁵ The rule seems to be that an agreement

¹ Hallen v. Runder, 1 Crompt. M. & R. 266; Horsfall v. Hey, 2 Ex. 778; Bostwick v. Leach, 3 Day, 476.

² Keyser v. School District, 35 N. H. 477.

³ Meyers v. Schemp, 67 Ill. 469. The ground of the decision was that “a building *prima facie* is real estate.” And see Walton v. Jarvis, 13 Up. Can. Q. B. 616. But see *contra*, Brown v. Morris, 83 N. C. 251, where a contract for bricks was not regarded as within the statute. See, also, Latham v. Blakely, 70 N. C. 368; Bond v. Coke, 71 N. C. 97; Conner v. Coffin, 22 N. H. 538.

⁴ In Noble v. Bosworth, 19 Pick. 314, there was a verbal reservation to the vendor of the dye kettles set in brick in a dye-house. It was held that the kettles, not being severed, passed to the vendee: See, also, generally, Smith v. Odom, 63 Ga. 499; Pea v. Pea, 35 Ind. 387; Patton v. Moore, 16 W. Va. 428; 37 Am. Rep. 789; Lyle v. Palmer, 42 Mich. 314; Detroit etc. R. R. v. Forbes, 30 Mich. 165; Trull v. Fuller, 28 Me. 545. A gin mill situated on land may be sold by parol: Brown v. Roland (Tex. Civ. App.), 33 S. W. Rep. 273.

⁵ Howard v. Easton, 7 Johns. 205. The court held that “possession

between the respective owners of two adjoining lots, that a party-wall should be built in a certain manner, or placed in a certain position, is required to be made by a written instrument.¹ In Maine, a mortgagee of land has the right of possession before there has been any breach of the condition, but he may divest himself of this right by contract. But, as a contract of this character operates upon an interest in land, it must be in writing.² Upon the same principle, evidently, was founded the decision that a verbal agreement made at the time of the delivery of a deed, that the grantee should not take possession nor record his deed until he should pay the first installment of the purchase money, is inoperative.³

§ 39. **Stock in corporations.**—The question has arisen whether shares of the stock of corporations, owning and deriving profit from real property, are to be regarded as interests in land. Some of the early cases leaned to

must be considered as an interest in land, within the meaning of the statute of frauds, so as to render the contract void as not having been reduced to writing": See *Lower v. Winters*, 7 Cowen, 263, in which this case was affirmed.

¹ *Rice v. Roberts*, 24 Wis. 461; 1 Am. Rep. 195. In a New York case (*Storms v. Snyder*, 10 Johns. 109), an agreement was made by a party to remove his fence, so as to open a certain road to its original width, and in consideration of this agreement, a promise was made by another to pay the first a sum of money. This was held not to be an agreement concerning an interest in land, since it was not for the conveyance of an interest in land. It would seem, however, that the decision in this case might rest upon the ground that, as the agreement was to restore the road to its original width, the agreement implied that it had been improperly widened: See, also, *Onderdonk v. Lord, Hill & D.* (Lalor's Supp.) 129.

² *Norton v. Webb*, 35 Me. 218; *Colman v. Packard*, 16 Mass. 39.

³ *Gilbert v. Bulkley*, 5 Conn. 262; 13 Am. Dec. 57. See further on this subject, *Smart v. Narding*, 15 Com. B. 652; *Kerr v. Shaw*, 13 Johns. 236; *Whittemore v. Gibbs*, 24 N. H. 484; *Miranville v. Silverthorn*, 1 Grant Cas. 410; *Sutton v. Sears*, 10 Ind. 223. In one case, it was said, concerning an agreement for an assignment of a lease, which was invalid by parol, that if the contract had been for the relinquishment of possession, it might not have been considered a contract for an interest in land: *Baron Parke in Buttemere v. Hays*, 5 Mees. & W. 456. This was but a suggestion, however, and is not in line with the subsequent decisions: See *Smith v. Toombs*, 3 Jur. 72; *Smart v. Harding*, 15 Com. B. 652; *Stark v. Cannady*, 3 Litt. 399; 14 Am. Dec. 76.

the view that such shares were an interest in or concerning land.¹ But it is now firmly settled that "the shareholder has only the right to receive the dividends payable on his share; that is, a right to his just proportion of the profits arising from the employment of the joint stock, consisting, indeed, partly of land; but whilst he holds his share, he has no interest or separate right to the land or any part of it."² And it is immaterial whether the association be a corporation or a joint stock company.³ But where the title to the lands is vested in the stockholders, personally, and the corporation takes charge of the management only, the shares are realty.⁴

§ 40. **Interest of execution purchaser.**—In Michigan, it has been held that the interest of an execution purchaser, though not the legal estate, is an equitable estate, which by the statute is protected against injury by an action of trespass or waste before the execution of the deed, and which after the deed relates back to the sale, and that it is an interest capable of assignment; but that the assignment must be executed and acknowledged like deeds of land. Therefore this interest can be divested otherwise than by redemption, only by deed.⁵ If

¹ *Welles v. Cowles*, 2 Conn. 567; *Townsend v. Ash*, 3 Atk. 336; *Drybutter v. Bartholomew*, 2 P. Wms. 127.

² *Martin, B.*, in *Watson v. Spratley*, 10 Ex. 236.

³ See *Sparling v. Parker*, 9 Beav. 450; *Duncuft v. Albrecht*, 12 Sim. 189; *Hilton v. Giraud*, 1 De G. & S. 183; *Myers v. Periga*, 11 Com. B. 90; *Johns v. Johns*, 1 Ohio St. 350; *Bradley v. Holdsworth*, 3 Mees. & W. 422; *Humble v. Mitchell*, 11 Ad. & E. 205; *Curling v. Flight*, 5 Hare, 242; *Ex parte Vauxhall Bridge Co.*, 1 Glyn & J. 101; *Entwistle v. Davis*, Law R. 4 Eq. 272; *Ex parte Horne*, 7 Barn. & C. 632; *Robinson v. Ainge*, Law R. 4 Com. P. 429. In Massachusetts, the rule has always been that shares of stock were personal property: *Tippets v. Walker*, 4 Mass. 595. See, also, *Vanpelt v. Woodward*, 2 Sand. Ch. 143; *Powell v. Jessopp*, 18 Com. B. 336.

⁴ *Angell & Ames on Corp.* § 559. A devise of rents is considered to be within the statute: *Brown v. Brown*, 33 N. J. Eq. 650.

⁵ *Whiting v. Butler*, 29 Mich. 122. See *Rucker v. Steelman*, 73 Ind. 396; *Payne's Admr. v. Patterson's Admr.*, 77 Pa. St. 134; *Loomis v. Loomis*, 60 Barb. 22; *Minot v. Mitchell*, 30 Ind. 228; 95 Am. Dec. 685; *Pearson v. East*, 36 Ind. 27; *Blair v. Bass*, 4 Blackf. 539.

a man conveys land to his wife, but reserves to himself by written contract the right of possession, and of repurchasing within five years, he has such an interest in land, that a parol agreement to surrender his right under such a contract is void.¹ "When, therefore, the elements of the case are simply a purchase, under a parol promise to hold for the benefit of the defendant in execution, I think such an arrangement, the statute of frauds being set up, cannot be enforced either at law or in equity."² Thus, where an oral agreement was made between A, a defendant in a foreclosure suit, and B, on the morning before the foreclosure sale, that B would purchase the property and convey it to A, at a stipulated price, it was held that the agreement was void under the statute of frauds.³

§ 41. Contract for board and lodging.—A contract to provide board and lodging is not an interest concerning land, and is not required to be in writing. By such a contract the technical relation of landlord and tenant is not created, and no interest in the real estate is acquired by the lodger.⁴

¹ *Grover v. Buck*, 34 Mich. 519. See *Daniels v. Bailey*, 43 Wis. 566.

² *Merritt v. Brown*, 21 N. J. Eq. 401, per Beasley, C. J.

³ *Bauman v. Holzhausen*, 26 Hun, 505. And see *Cornell v. Utica etc. R. R. Co.*, 61 How. Pr. 184.

⁴ *Wright v. Stavert*, 2 El. & E. 721; *White v. Maynard*, 111 Mass. 250; *Wilson v. Martin*, 1 Denio, 602. In *White v. Maynard*, *supra*, Mr. Justice Gray, in delivering the opinion of the court, said: "The opinions of eminent judges, in cases under English statutes giving the elective franchise to the sole occupiers of houses of a certain value, assume it as unquestionable that a mere lodger in the house of another is not a tenant. In *Fludier v. Lombe*, Cas. t. temp. Hardw. 307, Lord Hardwicke held, that a man who let rooms to lodgers was still the sole occupier of the house, and said: 'A lodger was never considered by anyone as an occupier of a house. It is not the common understanding of the word; neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger.' And this definition is cited with approval by Chief Justice Erle in *Cook v. Humber*, 11 Com. B., N. S., 33, 46. So in *Brewer v. McGowen*, Law R. 5 Com. P. 239, it was held that the owner or tenant of a dwelling-house was not a joint occupier with a lodger to whom he let the exclusive use of a bedroom and the joint use of a sittingroom; and Mr. Justice Willes, after observing that the lodger 'clearly was not a joint occupier of the room in which he took his meals,'

§ 42. **Equity of redemption.**—A mortgagor's equity of redemption, or the legal estate in fee which remains in him, can only be divested by an instrument in writing made in compliance with the statute prescribing the mode and manner of conveying lands.¹ Hence, a contract by a mortgagee for the purchase of the right of a mortgagor to redeem the land mortgaged, at a value at which it might be appraised by third persons, is a contract for the sale of land, and no action can be maintained upon it unless in writing.² In a Kentucky case, the mortgagor and

added: 'And with respect to the bedroom, he clearly had not an occupation as owner or tenant, but only an occupation as lodger.' To constitute a tenancy under the English tax acts, the exclusive possession of the apartment must be given to the lessee. The bare admission of a common lodger, where legal possession of the whole house is retained by the landlord, is not sufficient: *Smith v. St. Michael*, 3 El. & E. 383; *Stamper v. Overseers of Sunderland*, Law R. 3 Com. P. 388; *Queen v. St. George's Union*, Law R. 7 Q. B. 90. So the permission to a man to lodge for a year in a particular room, does not violate a covenant in a lease of a coffeehouse, not to lease or underlet the premises, or any portion of them: *Doe v. Laming*, 4 Camp. 73; *Greenslade v. Tapscott*, 1 Crompt. M. & R. 55. And see *Newman v. Anderton*, 2 Bos. & P., N. R., 224; *Fenn v. Grafton*, 2 Bing. N. C. 617; *Monks v. Dykes*, 4 Mees. & W. 567; *Swain v. Mizner*, 8 Gray, 182; 69 Am. Dec. 244.

¹ *Odell v. Montross*, 68 N. Y. 499. In that case plaintiff had executed to defendant a deed absolute on its face of certain property, but which in fact was made as security for the payment of certain indebtedness. Defendant paid to plaintiff, subsequently, fifty dollars, with the intent on the part of both parties that the same should be received in full settlement of all claims of plaintiff to the property or to a reconveyance. Defendant executed and delivered to plaintiff a paper acknowledging the receipt of that sum "in full satisfaction for all claims and demands whatsoever as to conveyance of property or otherwise up to this date." In an action to redeem, the court held, "that neither the written receipt nor the payment operated to change the deed from a mortgage to an absolute conveyance; that no agreement could be spelled out of the instrument which could be performed, and it could not be supplemented by parol proof, and made a perfect contract to release or convey lands; and that the payment and receipt of the money did not operate as an estoppel, or take the case out of the statute of frauds." "An equity of redemption is a right or estate in lands, and cannot be released or conveyed except by an instrument in writing": *Clark v. Condit*, 18 N. J. Eq. 358. See, also, *Junkins v. Lovelace*, 72 Ala. 303; *Dickenson v. Mays*, 60 Miss. 388.

² *Marble v. Marble*, 5 N. H. 374. See *Scott v. McFarland*, 13 Mass. 309; *Agate v. Gignoux*, 1 Rob. (N. Y.) 278; *Massey v. Johnson*, 1 Ex. 255; *Toppin v. Lomas*, 16 Com. B. 145; *Williams v. Williams*, 7 Reporter,

judgment debtor possessing the privilege of redemption procured another to pay the redemption money, promising to refund at a future day, and the purchaser agreed to reconvey upon the payment of the money advanced. The transaction was deemed a pledge of the equity of redemption, and not required to be in writing.¹ But where a contract by parol has been made by a person for the purchase of land, and he by parol agrees to permit another to purchase the land in his stead, and by the former's direction the land is conveyed to the latter, he cannot rely on the statute of frauds when he is sued to recover the value of the assignment.² A sale of land under a power of sale in a mortgage cannot be made by parol. Such a sale is a nullity.³

§ 43. Improvements upon land.—In this country the established rule seems to be that improvements upon land may be conveyed without deed, as they are not considered as land or inteersts in land. The rule in New

656; *Van Keuren v. McLaughlin*, 19 N. J. Eq. 187; *Kelley v. Stanberry*, 13 Ohio, 408; *Cowles v. Marble*, 37 Mich. 158; *In re Betts*, 7 Reporter, 522. But see *Hogg v. Wilkins*, 1 Grant Cas. 67; *Pomeroy v. Winship*, 12 Mass. 513; 7 Am. Dec. 91. Agreements that the mortgagee will bid in the property at the sale under foreclosure and permit the mortgagor to redeem, must be in writing: *Junkins v. Lovelace*, 72 Ala. 303. So must an agreement by the mortgagee to convey part of the lands to the wife of the mortgagor for her release of dower: *Gualtney v. Wheeler*, 26 Ind. 415; *Carlisle v. Brennan*, 67 Ind. 12.

¹ *Griffin v. Coffey*, 9 Mon. B. 452; 50 Am. Dec. 519. As a contract of this character may result in the transfer of the legal title, it would seem that it should be in writing: See, also, *Millard v. Hathaway*, 27 Cal. 119; *Hoen v. Simons*, 1 Cal. 119; 52 Am. Dec. 291; *Tohler v. Folsom*, 1 Cal. 207; *Videau v. Griffin*, 21 Cal. 389; *McLaren v. Hutchinson*, 22 Cal. 187; 83 Am. Dec. 59; *Bayles v. Baxter*, 22 Cal. 575. A contract to procure the conveyance of an equity of redemption held by a third person must be by writing. It is a contract for the sale of an interest in land: *Rawdon v. Dodge*, 40 Mich. 697.

² *McCarthy v. Pope*, 52 Cal. 561.

³ *Jackson v. Scott*, 67 Ala. 99. An agreement made by a mortgagee to redeem from a purchaser at an execution sale, for the benefit of the mortgagor, and to allow him to redeem on repayment of the amount advanced with interest and balance due on the mortgage, is an agreement required to be in writing: *Junkins v. Lovelace*, 72 Ala. 303.

York has been thus expressed: "It has been repeatedly held by this court that a parol promise or agreement to pay for the improvements on land is not within the statute of frauds. Improvements upon land distinct from the title or possession, are not an *interest in* land within the meaning of the statute. They are only another name for the work and labor bestowed on the land, and a parol promise to pay for work already done or to be done upon land never has been held to come within the statute."¹ Thus, where the improvements consist of a number of houses, they may be sold without a deed;² and improvements upon uncultivated lands may be conveyed without writing or deed.³ This is clearly the rule in New York,

¹ Mr. Justice Sunderland, in *Lower v. Winters*, 7 Cowen, 263, 264. In that case, the contract proved was this: The plaintiff said to the defendant: "You can have my improvements for one hundred dollars and I retain possession of the land next season, the one hundred dollars to be paid in stock in one year from March next." The defendant replied: "I will give it if I can get a contract from Pierpont, the landlord." The court said further, referring to this contract: "It is manifest that the plaintiff did not undertake to sell, nor the defendant to purchase, any interest in land; that the defendant expected to obtain from the landlord, and his contract for the improvements was upon the condition of his being able to purchase the land from the owner. It was a contract therefore, for the improvements merely, and was valid as to the subject matter, though not in writing;" See *Dickerson v. Mays*, 60 Miss. 388; *Smith v. Waggoner*, 50 Wis. 155; *Bostwick v. Leach*, 3 Day, 476.

² *Scoggin v. Slater*, 22 Ala. 687. But see *Landon v. Platt*, 34 Conn. 517; *Cassell v. Colins*, 23 Ala. 676. See *Foster v. Mabe*, 4 Ala. 402; 37 Am. Dec. 749.

³ *Clark v. Schultz*, 4 Mo. 235. The court, per Wash, J. after remarking that this was the rule in New York, said: "In looking to the condition of our country, in which most of the land belongs still to the United States, to the settlements in various quarters of the State, which are extending much more rapidly than the surveys and sales of the public lands can be conveniently made, and to the fact that much labor and expense is of necessity employed on the public lands in providing food, accommodation, and comfort for the hardy and enterprising pioneer, we feel the more inclined to follow the New York decisions, and to leave the settlers free to dispose of their improvements as of their horses and cattle. In truth, the very offer to sell the improvement and give up the accommodation and comfort which the squatter has obtained for himself by his labor on the public lands, excludes altogether the idea that he intends by the sale to pass away any title or interest in the soil."

and may be illustrated by a case on which plaintiff had entered upon defendant's land without right or title and made improvements upon it. A verbal promise to pay the plaintiff for his labor and for a number of buildings erected upon the land, was held operative because the improvements were not an interest in the land.¹ And where the statute allows a tenant for improvements made by him upon the land, his equitable claim to betterments may be conveyed without a deed if accompanied by an actual transfer of possession.² But in England, it seems a different view obtains. Thus, in a case where a verbal agreement had been made by the lessee to take a growing crop and certain improvements upon a farm at a fixed price, it was said: "The defendant would not have the benefit of the work, labor, and materials, unless he had the land; and we are of opinion that the right to the crops and the benefit of the work, labor, and materials, were both of them an interest in the land."³ In Maine, it was held that a house erected by one who went into possession under an oral agreement for a bond for a deed was personal property, and that a purchaser under an execution might maintain an action against the owner of the land who would not allow him to remove it.⁴ But in

¹ *Frear v. Hardenbergh*, 5 Johns. 272; 4 Am. Dec. 356. See, also, *Benedict v. Beebee*, 11 Johns. 145; *Godeffroy v. Caldwell*, 2 Cal. 489; 56 Am. Dec. 360; *Howard v. Easton*, 7 Johns. 205; *Zickafosse v. Hulick*, 1 Morris, 175; 39 Am. Dec. 458; *Forbes v. Hamilton*, 2 Tyler, 356; *Green v. Vardiman*, 2 Blackf. 324; *Thouvenin v. Lea*, 26 Tex. 612. An agreement to submit to arbitrators the question as to what compensation a party should make for the use of a road is not an agreement for an interest in lands: *Mitchell v. Bush*, 7 Cowen, 185.

² *Lombard v. Ruggles*, 9 Me. 62.

³ *Lord Lyndhurst in Earl of Falmouth v. Thomas*, 1 Crompt. & M. 89. And see *Vaughan v. Hancock*, 3 Com. B. 766. But an agreement to pay a higher rent in return for the making of repairs is not required to be in writing: *Price v. Leyburn*, Gow. 109; *Hoby v. Roebuck*, 2 Marsh. 433; *Angell v. Duke*, Law R. 10 Q. B. 174; *Morgan v. Griffith*, Law R. 6 Ex. 70.

⁴ *Pullen v. Bell*, 40 Me. 314. See *Russell v. Richards*, 10 Me. 429; 25 Am. Dec. 254; *Hilborne v. Brown*, 12 Me. 162; *Jewett v. Patridge*, 12 Me. 243; 28 Am. Dec. 173. A contract permitting the removal of a house on the land of another is not within the statute: *Rogers v. Cox*, 96 Ind. 157; 49 Am. Rep. 152.

Massachusetts, it was held that buildings are part of the freehold, and if erected on the land of another, voluntarily and without any contract, they become the property of the owner;¹ and if a husband erect buildings on the land of his wife, they become realty because he cannot contract with her;² so a house erected by a reversioner during the intervening term becomes real estate;³ and, at variance with the rule in Maine, it is held in Massachusetts that a building erected by one who has a contract for a conveyance of the land is part of the realty.⁴ When the land conveyed by a deed is described by metes and bounds, and the quantity of land is estimated, a parol agreement, made at the same time, to pay the grantee for any deficiency that on measurement may be found to exist, is void.⁵

§ 44. Qualification or enlargement of interests already acquired.—Not only must every interest in land be created either by deed or operation of law, but every agreement by which any right in land is qualified must also be by deed. Thus, an agreement between the parties to a mortgage of indemnity and a third person, that the mortgage should be altered by the insertion in it of a provision that such third person should also be indemnified as surety for the mortgagor, is equivalent to an agreement for the execution of a new mortgage, and must be in writing.⁶ In the absence of statutory provision, an

¹ First Parish etc. *v.* Jones, 8 Cush. 184.

² Washburn *v.* Sproat, 16 Mass. 449.

³ Cooper *v.* Adams, 6 Cush. 87.

⁴ Eastman *v.* Foster, 8 Met. 19, 26. See also Oakman *v.* Dorchester Ins. Co., 98 Mass. 57; Howard *v.* Fessenden, 14 Allen, 124; Poor *v.* Oakman, 104 Mass. 309.

⁵ Bradley *v.* Blodget, Kirby, 22; 1 Am. Dec. 11.

⁶ Irwin *v.* Hubbard, 49 Ind. 350; 19 Am. Rep. 679. The signing of a bond by such third person as surety for the mortgagor, in consideration of the promise to so change the mortgage, is not such part performance of the agreement as to take the case out of the statute of frauds; nor is the refusal on the part of the mortgagor to change the mortgage such a fraud that a court of equity will decree specific performance: Irwin *v.* Hubbard, 49 Ind. 350; 19 Am. Rep. 679.

agreement that real estate, the title to which had been taken previously as security, should also continue as security for further advances, must be by deed.¹ This, however, might not be the rule where a mortgage is not regarded as a conveyance of land, but merely as an incident to the debt. An agreement for the substitution in the description of a mortgage of other real estate than that contained in the mortgage must also be in writing.² So must there be a written instrument to convert a mortgage into a conditional sale. A parol agreement is inoperative.³

§ 45. **Revival of void contract.**—Where a written contract for the sale of lands has become void by its own terms it cannot be revived, except by an instrument in writing.⁴ In the case just cited there was an agreement for the sale of land with this proviso: "*Provided*, when Davis sees the land he should like it; if he does not, no bargain." The court said: "The written contract was to cease and become a nullity, if when Davis saw the land in Ohio, he should not like it. When, therefore, he had viewed the land, and declared his dislike to it, the contract by its own terms expired, and after it had once expired, it could not be resuscitated by parol, no more than it could have been originally created by parol. This position would be too clear to admit of a question, if instead of a few days, a few years had intervened between

¹ Curle's Heirs v. Eddy, 24 Mo. 117; 66 Am. Dec. 699; Stoddard v. Hart, 23 N. Y. 556.

² Castro v. Illies, 13 Tex. 229. See Williams v. Hill, 19 How. 246. As to the necessity of a deed for the execution of a defeasance to an absolute conveyance, see Boyd v. Stone, 11 Mass. 342.

³ Woods v. Wallace, 22 Pa. St. 171; Brown v. Nickle, 6 Pa. St. 391. In Kunkle v. Wolfersberger, 6 Watts, 126, it is said: "A formal conveyance may certainly be shown to be a mortgage by extrinsic proof, while a formal mortgage may not be shown to be a conditional sale by the same means. In the one case the proof raises an equity consistent with the writing, and in the other would contradict it": See, also, Colwell v. Woods, 3 Watts, 188; 27 Am. Dec. 345. An agreement to foreclose a mortgage is also required to be in writing: Cox v. Peele, 2 Bro. C. C. 334.

⁴ Davis v. Parish, Litt. Sel. Cas. 153; 12 Am. Dec. 287.

the expiration of the written contract and the attempt to revive it. Upon principle, however, it is evident that the length of time which had elapsed can make no difference in this respect."

§ 46. **Revival of satisfied mortgage.**—In the case of a mortgage, it becomes, after payment, *functus officio*, and it cannot be kept alive as a subsisting security, nor revived to secure the original or any other indebtedness.¹ Even when an assignment of the mortgage is made, upon the payment of the debt, to the mortgagor, he has not the power to give it the effect, by assignment to a third person, of defeating prior creditors.² But this may be done, provided the rights of third persons are not affected.³ A mortgage cannot be retained as security for the payment of another debt than that originally secured, without the mortgagor's consent.⁴ An extension of the time for the

¹ McClure v. Andrews, 68 Ind. 97; Mead v. York, 6 N. Y. 449; 57 Am. Dec. 467; Thomas' Appeal, 30 Pa. St. 378; McGiven v. Wheelock, 7 Barb. 22; Ledyard v. Chapin, 6 Ind. 320; Perkins v. Sterne, 23 Tex. 561; 76 Am. Dec. 72; Fewell v. Kessler, 30 Ind. 195; Pelton v. Knapp, 21 Wis. 63; Harris v. Hooper, 50 Md. 537; Dolan v. Kehr, 9 Mo. App. 351; Rockard v. Talbird, Rice Ch. 158; York Co. Savings Bank v. Roberts, 70 Me. 384. Where the note was paid by the mortgagor, and the following day the mortgagor took back part of the money and agreed that the mortgage should stand as security for the money repaid, a creditor who had levied an execution upon the land was allowed to hold it freed from the mortgage: Bowman v. Manter, 33 N. H. 530; 66 Am. Dec. 743; Warner v. Blakeman, 36 Barb. 501; Gardner v. James, 7 R. I. 396; Large v. Van Dorn, 14 N. J. Eq. 308; Kellogg v. Ames, 41 Barb. 218; Purser v. Anderson, 4 Edw. Ch. 17. But the payment must be made to the creditor: Fields v. Sherrill, 18 Kan. 365.

² Gardner v. James, 7 R. I. 396; Carlton v. Jackson, 121 Mass. 592; Champney v. Coope, 32 N. Y. 543; Bowman v. Manter, 33 N. H. 530; 66 Am. Dec. 743. And see Whitney v. Franklin, 28 N. J. Eq. 126.

³ Marvin v. Vedder, 5 Cowen, 671. And see Darst v. Gale, 83 Ill. 136.

⁴ Beardsley v. Tuttle, 11 Wis. 74; Spencer v. Fredendall, 15 Wis. 666; Johnson v. Anderson, 30 Ark. 745; Whiting v. Beebe, 12 Ark. 421; Walker v. Snediker, Hoff. 145; International Bank v. Bowen, 80 Ill. 541; Ex parte Hooper, 19 Ves. 477. And see Richardson v. Cambridge, 2 Allen, 118; 79 Am. Dec. 767; Holman v. Bailey, 3 Met. 55; Merrill v. Chase, 3 Allen, 339; Furbush v. Goodwin, 25 N. H. 425; Jones v. Brogan, 29 N. J. Eq. 139; Swope v. Leffingwell, 4 Mo. App. 525. See, also, Sheddy v. Geran, 113 Mass. 378; Hubbell v. Blakeslee, 71 N. Y. 63; Bolles v. Wade,

redemption of mortgaged property is generally not regarded as conferring an interest in land, and therefore may be by parol.¹ In California, the Code provides that "a mortgage can be created, renewed, or extended only by writing, executed with the formalities required in the case of a grant of real property."² In some states it is held that a promise made by a mortgagee to relinquish his claim on the mortgaged premises must be by a written instrument.³ In others, it is decided that a writing is not necessary.⁴

§ 47. Agreement for execution of covenant to convey.—An agreement to execute a covenant to convey land must also be in writing.⁵ But a writing is not required

4 N. J. Eq. 458; *Hoy v. Bramhall*, 19 N. J. Eq. 74, 563; 97 Am. Dec. 687; *Goulding v. Bunster*, 9 Wis. 513; *Hall v. Southwick*, 27 Minn. 234; *Purser v. Anderson*, 4 Edw. Ch. 17; *Peckham v. Haddock*, 36 Ill. 38; *Joslyn v. Wyman*, 5 Allen, 62; *Hodgman v. Hitchcock*, 15 Vt. 374; *Jordan v. Forlong*, 19 Ohio St. 89.

¹ *Hamilton v. Terry*, 11 Com. B. 954; *Griffin v. Coffey*, 9 Mon. B. 452; 50 Am. Dec. 519. See *Martin v. Martin*, 16 Mon. B. 8. There is a difference of opinion upon the question whether a mortgage can be released without writing, depending upon the registry laws, and whether the mortgage is to be regarded as a conveyance of the land, or a mere lien or charge upon it incident to the debt: *Hunt v. Maynard*, 6 Pick. 469; *Parker v. Parker*, 2 Met. 423; *Malins v. Brown*, 4 N. Y. 403; *Phillips v. Leavitt*, 54 Me. 405; *Leavitt v. Pratt*, 53 Me. 147; *Doe v. Smith*, 6 Barn. & C. 112.

² Civ. Code, § 2922. See *Porter v. Muller*, 53 Cal. 677.

³ *Parker v. Parker*, 2 Met. 423; *Maynard v. Hunt*, 5 Pick. 240; *Hunt v. Maynard*, 6 Pick. 488; *Leavitt v. Pratt*, 53 Me. 147; *Phillips v. Leavitt*, 54 Me. 405. See *Warden v. Adams*, 15 Mass. 236; *Vose v. Handy*, 2 Greenl. 322; 11 Am. Dec. 101; *Mitchell v. Burnham*, 44 Me. 302. See *Howland v. Blake*, 97 U. S. 624.

⁴ *Wallis v. Long*, 16 Ala. 738; *Barrelli v. O'Connor*, 6 Ala. 617; *Howard v. Gresham*, 27 Ga. 347; *Ackla v. Ackla*, 6 Pa. St. 228. See *Malins v. Brown*, 4 N. Y. 403; *Southerin v. Mendum*, 5 N. H. 420. On the subject of a parol waiver, see *Doe v. Smyth*, 6 Barn. & C. 112.

⁵ *Ledford v. Ferrell*, 12 Ired. 285. *Ruffin, J.*, quoted the words of the statute, that "all contracts to sell or convey any lands, or any interest in or concerning them, shall be void, unless such contract be put in writing and signed by the party to be charged therewith," and continuing, said: "The plaintiff's counsel admits that if *Ferrell's* promise had been to convey the land to the plaintiff, no action would lie on it. But a distinction is taken, that the promise is not of that kind, but is to execute a valid obligation, binding him thereafter to convey, which is sup-

for the validity of an agreement to locate lands, and to procure patents in consideration of receiving a part of the land for such services.¹ A verbal promise made by the grantee, when he receives the deed, to reconvey the land to the grantor if he does not pay the purchase money when demanded, must be in writing.²

§ 48. Executory agreement for creation of leases.—

While the statute of frauds allows leases for terms varying in the different States from one to three years to be created by parol, yet to render the lease effectual, possession must be taken; the exception of the statute does not apply, except in New York, to executory agreements for leases which are not consummated by the assumption of possession on the part of the lessee. In reference to this distinction, it is said: "It may be said that it is strange that the second section of the statute has made a lease for less than three years from the making valid, and yet that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee; but first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded

posed not to be within the statute. But the court is clearly of the contrary opinion, for both the obligation to convey the land, and the promise to give the obligation, are 'concerning' land, and within the words of the act. Indeed, it would be absurd to say, that an oral promise to convey land is void, but that a promise that the party will thereafter bind himself is valid. By the same reason, although the promise to pay the debt of another be void under the tenth section of the act, a promise to give a bond for the debt would be good, which cannot be. Such a construction would be a palpable evasion of the statute, and let in all the evils against which it was directed": See, also, *Yates v. Martin*, 1 Chand. 118.

¹ *Watkins v. Gilkerson*, 10 Tex. 340. See *Maxwell v. Wallace*, 1 Busb. Eq. 251.

² *Gallagher v. Mars*, 50 Cal. 23. And see *Heyn v. Philips*, 37 Cal. 529; *Fuller v. Reed*, 38 Cal. 99; *Harris v. Brown*, 1 Cal. 98; *Hall v. Yoell*, 45 Cal. 584; *Ryan v. Tomlinson*, 39 Cal. 639; *Price v. Sturgis*, 44 Cal. 591; *McCarthy v. Pope*, 52 Cal. 561.

upon it a claim for damages, which might far exceed what he could claim under the character of a lease; or, secondly, this distinction might not have been contemplated, but may be the true result of the construction of the statute of frauds.”¹ Thus, where, before the expiration of a written lease, the parties agreed to renew the lease for another year, on the same terms, and before the lease expired, the lessee verbally notified the lessor that he would not perform the agreement, but held over, nevertheless, after the termination of the lease, but without intending to occupy under any agreement, the lessor was not permitted to recover of the lessee for the use and occupation of the premises beyond the time of his actual possession.² Agreements for the assignment of a lease, as involving an interest in land, must also be in writing.³

§ 49. Lands owned in partnership.—The early rule concerning real estate used for partnership purposes, was that the realty did not lose its character as such, and as a consequence of this principle the heirs of the partners succeeded to it.⁴ But the prevailing rule now is, that when

¹ *Edge v. Stafford*, 1 Crompt. & J. 391. A leading case is *Inman v. Stamp*, 1 Stark. 12. In that case, the defendant had agreed, verbally, to take the apartments of plaintiff, for a term not exceeding three years, at a stipulated rent, payable quarterly. The plaintiff, placing reliance upon this verbal agreement, removed from his window the advertisement of “lodgings to let.” The day before the commencement of the proposed term, the defendant notified the plaintiff of his intention to abandon the agreement. *Ellenborough, C. J.*, held that this was a contract for an interest in lands, within the meaning of the statute of frauds, and was therefore void. An intimation was made, however, that if possession of the premises had been taken by the defendant, the rule would have been different; an entry of that character would have been part execution of the contract.

² *Delano v. Montague*, 4 Cush. 42; *Stackberger v. Mosteller*, 4 Ind. 461. This case was, however, questioned in *Huffman v. Starks*, 31 Ind. 474. But see *Young v. Dake*, 5 N. Y. 463; 55 Am. Dec. 356. And see *Bolton v. Tomlin*, 5 Ad. & E. 856; *Rawlins v. Turner*, 1 Raym. Ld. 736.

³ *Anonymous*, 1 Vent. 361; *Poultney v. Holmes*, 1 Strange, 405.

⁴ *Bell v. Phyn*, 7 Ves. 453; *Balmain v. Shore*, 9 Ves. 500; *Thompson v. Dixon*, 3 Broc. C. C. 199. But see *Shearer v. Shearer*, 98 Mass. 107; *Wilcox v. Wilcox*, 13 Allen, 252.

real estate is purchased by partners for the use and convenience of the partnership and with its funds, although the manner of conveyance may make them tenants in common, yet, if there is no express agreement, or if there are no circumstances showing an intent that such property shall be held for their separate use, it will be considered and treated in equity as vested in them in their partnership capacity. There is, however, the implied trust that the partners shall hold it until the purposes for which the purchase was made shall be accomplished, and that if necessity requires, application may be made of it to the payment of the partnership debts.¹

§ 50. **Parol proof of partnership in land.**—In Pennsylvania, it is held that it is not competent to show by parol, in order to affect the title to possession of land, that a deed to several persons as tenants in common was made to them as partners, and that the real estate was purchased and paid for by them, and as a matter of fact, was partnership property. It is there the rule that when partners intend to bring real estate into partnership stock, that intention must be evidenced by a deed or written instrument placed on record.² Of course, in that State

¹ *Elliot v. Brown*, 3 Swanst. 489; *Jeffereys v. Small*, 1 Vern. 217; *Burnside v. Merrick*, 4 Met. 537; *Fereday v. Wightwick*, 1 Russ. & M. 45; *Essex v. Essex*, 20 Beav. 442; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; *Howard v. Priest*, 5 Met. 582. In *Forster v. Hale*, 5 Ves. 309, Lord Chancellor Loughborough says: "The partnership being established by evidence, upon which a partnership may be found, the premises necessary for the purposes of the partnership are by operation of law held for the purposes of that partnership": See, also, *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Henderson v. Hudson*, 1 Munf. 510; *Hanff v. Howard*, 3 Jones Eq. 440; *Fairchild v. Fairchild*, 64 N. Y. 471; *Boyers v. Elliott*, 7 Humph. 204; *Wells v. Stratton*, 1 Tenn. Ch. 328; *Jones v. McMichael*, 12 Rich. 176.

² *Hale v. Henrie*, 2 Watts, 144; 27 Am. Dec. 789. The opinion of the court was delivered by Mr. Justice Sergeant, who said: "The title set up by the defendant professes to be paramount to that of Henrie in his separate capacity, and to defeat the plaintiff's execution by showing that although the deed to Capp and Henrie was to them as tenants in common, and therefore on its face, each held an undivided moiety, yet in fact they held the property as partners pledged to partnership creditors,

the same rule would apply to an agreement to make real estate part of the common stock. Such agreement to be valid must be in writing and ought to appear of record.¹ In California, it was held in an early case, a partnership can exist in the purchase and sale of lands only when the contract is reduced to writing. But it is immaterial who is named as grantee, as he is only a trustee for the partnership; and the real estate is to be treated as personal estate for the purpose of distribution.² In a later case, however, in the same State the authorities were reviewed, and the court held that such a contract is an agreement to share the gains and losses of a business transaction. It does not contemplate the transfer of title from one party to the other, nor does it involve the creation of any

in exclusion of the plaintiff who was a separate creditor of one partner. Such a trust or ownership of the property is inconsistent with the title on record which is vested in them as tenants in common. To permit a person, apparently owning property as an individual, to aver a different right in himself as partner, by which his relations to creditors and others are to be affected, would defeat the statute of frauds and perjuries, by which no interest in real estates (except a lease for a short period) can vest or be transferred without deed or writing. It would even be worse than to pass real estate without writing, since a deed would thus express one thing and mean another; and our recording acts, instead of being guides to truth, would be no better than snares. The policy of the recording acts, which began with the settlement of the State, and which long experience has proved to be beneficial, is to render the manner in which an interest or right in real estate is held, in every respect open and notorious. They require all deeds or writings which may affect lands to be placed on record; and as the statute of frauds forbids such interest to be held or transferred without deed or writing, the system is thus complete. No averment of any right by parol, or by what is still less, the nature of the fund which pays or the uses or purposes the property is applied to, can be allowed to stamp a character on the title inconsistent with that appearing on the deed and record, to the prejudice of third persons:" See *Gregory's Lessee v. Setter*, 1 Dall. 193; *Wallace v. Duffield*, 2 Serg. & R. 525; 7 Am. Dec. 660; *German's Lessee v. Gabbald*, 3 Binn. 304; 5 Am. Dec. 372; *Ebberts' Appeal*, 70 Pa. St. 81; *Abbott's Appeal*, 50 Pa. St. 238; *Lefevre's Appeal*, 69 Pa. St. 125; 8 Am. Rep. 229; *Ridgway, Budd & Co's Appeal*, 15 Pa. St. 181; 53 Am. Dec. 586; *Erwin's Appeal*, 38 Pa. St. 535; *Overholt's Appeal*, 12 Pa. St. 222; 51 Am. Dec. 593; *Cumming's Appeal*, 25 Pa. St. 269; 64 Am. Dec. 695.

¹ *Harding v. Devitt*, 10 Phila. 95.

² *Gray v. Palmer*, 9 Cal. 616.

interest or estate other than a pecuniary interest. The partnership may be formed for the purpose of dealing in lands, by buying and selling lands generally, or it may be confined to a speculation upon a single investment, and, in either event, is not governed by the statute of frauds, but may be formed by oral agreement, and its existence may be proved by parol evidence.¹ It must be admitted that the decisions upon this subject are conflicting, but the tendency of the modern cases seems to be towards considering all property, real as well as personal, made the subject of partnership, as stock in trade, and thus to a certain extent to divest land of its character as realty.²

§ 51. **Same subject—Rule in various States.**—In a case in New York in which this question arose, the court said: "It is necessary to inquire whether a partnership in reference to lands can be formed and proved by parol. Upon this question there is considerable conflict in the

¹ *Bates v. Babcock*, 95 Cal. 480; 29 Am. St. Rep. 133. The question was carefully considered by the court, Chief Justice Beatty dissenting on the ground that a parol contract was void under the statute of frauds.

² *Clagett v. Kilbourne*, 1 Black, 348; *Browne on Statute of Frauds*, § 259; 1 *Montague on Partnership*, 164, and App. 97; 3 *Kent's Com.* 37; *Crawshay v. Maule*, 1 Swanst. 495. In a case where the entire subject of the transaction was land, and the partnership arose solely out of this subject, the court observed that whether a case of this character could be brought within the cases was a difficult question. As illustrating the difficulty, it said: "If A alleges that B agreed to give him an interest in land, the statute applies; but if he adds that the land was to be improved and resold at their joint risk for profit and loss, then, according to the argument, the statute does not apply." But the court was not able to decide that there was such an interest in land involved as required a writing, and submitted the question of the making of the agreement to the jury: *Dale v. Hamilton*, 5 Hare, 369. And see *Smith v. Tarlton*, 2 Barb. Ch. 336; *Fall River Whaling Co. v. Borden*, 10 Cush. 458; *Traphagen v. Burt*, 67 N. Y. 30. These authorities are in conflict with *Gray v. Palmer*, 9 Cal. 616, cited *supra*. The rule has been limited to cases concerning the partners, or partners and the persons dealing with them in regard to the partnership land: *Black v. Black*, 15 Ga. 449. An agreement between owners of separate tracts of land, by which they agree to sell them and divide the profits equally, must be in writing, because it conveys an interest in land: *Goldstein v. Nathan*, 158 Ill. 641.

authorities. On the one hand it is claimed that a parol agreement for such a partnership would be within the statute of frauds, which provides that no estate or interest in land shall be created, assigned, or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, or declaring the same; and to this effect is the case of *Smith v. Burnham*.¹ On the other hand, it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and, in such case, will not allow one partner to commit a fraud or breach of trust upon his copartner by taking advantage of the statute of frauds; and to this effect are the following authorities: *Dale v. Hamilton*,² *Essex v. Essex*,³ *Bunnel v. Taintor*.⁴ A full discussion of the question is found in *Dale v. Hamilton*, and the reasoning and review of the cases there by Vice-Chancellor Wayram are quite satisfactory. The general doctrine is there laid down that a 'partnership agreement between A and B that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands, may be proved without being evidenced by any writing signed by, or by the authority of the party to be charged therewith within the statute of frauds; and such an agreement being proved, A or B may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing.' I am inclined to think this doctrine to be founded upon the best reason and the most authority. . . . Suppose two persons by parol agreement enter into a partnership to speculate in lands,

¹ 3 Sum. 435.

³ 5 Hare, 369.

² 20 Beav. 449

⁴ 4 Conn. 568.

how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned, or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys nor assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an estate in lands without a writing.”¹ This case has been expressly approved and followed by the Supreme Court of Indiana.² But this is not the law in Virginia, where an agreement for a joint interest in a purchase of lands must be by deed or writing;³ nor has it received the sanction of the Supreme Court of Wisconsin.⁴ The legal title to real property cannot be

¹ *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550, per Mr. Commissioner Earl.

² *Holmes v. McCray*, 51 Ind. 358; 19 Am. Rep. 735. “A contract by which parties agree to acquire land together, one furnishing the certificate, and the other the labor and expense of surveying and patenting it, is not a contract for the purchase and sale of land by one to the other, but, as has been frequently held by this court, it is an agreement by which they are to acquire the land jointly”: *Gibbons v. Bell*, 45 Tex. 417, 423. See, also, *Smock v. Tandy*, 28 Tex. 132; *Miller v. Roberts*, 18 Tex. 19; *Evans v. Hardeman*, 15 Tex. 480; *Watkins v. Gilkerson*, 10 Tex. 340; *Stuart v. Baker*, 17 Tex. 417; *Houston v. Sneed*, 15 Tex. 307; *Hemming v. Zimmerschitte*, 4 Tex. 159; *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 136.

³ *Walker v. Herring*, 21 Gratt. 678; 8 Am. Rep. 616; *Henderson v. Hudson*, 1 Munf. 510.

⁴ *Bird v. Morrison*, 12 Wis. 138. In *Smith v. Burnham*, 3 Sum. 437, there was an oral agreement to become copartners in the buying and selling of land and lumber. The capital for this purpose was to be jointly furnished, and the profits and losses incurred in the transaction of the business equally divided. Judge Story held that the action sought to enforce a trust in land created by the failure to observe the oral partnership agreement, and that it could not be maintained: See, also, *Freeman on Cotenancy and Partition*, § 119; *Yeatman v. Woods*, 6 Yerg.

taken and held by a partnership as such in its firm name.¹ It seems to be settled beyond question that an agreement by parol for the formation of a partnership in land is binding, aside from the consideration that thereby the title to land may be affected.²

§ 52. **Agreements to establish title to land.**—An agreement to perfect the title to land or to have an adverse title determined invalid, it has been held, is an agreement

21; 27 Am. Dec. 452; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Sumner v. Hampson*, 8 Ohio, 328; *Piper v. Smith*, 1 Head, 93; *M'Alister v. Montgomery*, 3 Hayw. (Tenn.) 94; *Scruggs v. Blair*, 44 Miss. 406; *Goodburn v. Stevens*, 5 Gill, 1; *Holland v. Fuller*, 13 Ind. 195; *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510; *Hauff v. Howard*, 3 Jones Eq. 440; *Lang's Heirs v. Waring*, 25 Ala. 625; 60 Am. Dec. 533; *Collins v. Warren*, 29 Mo. 236; *Piatt v. Oliver*, 3 McLean, 27; *Shearer v. Shearer*, 98 Mass. 111; *Wilcox v. Wilcox*, 13 Allen, 252. But whether real estate purchased by partners will be treated as such, or as personalty, will be determined by the intention of the parties. If their intention is to hold it as cotenants, it will retain its character as realty: *Hunt v. Benson*, 2 Humph. 459; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; *Smith v. Smith*, 5 Ves. 193; *Coder v. Huling*, 27 Pa. St. 88; *Collumb v. Read*, 24 N. Y. 513; and it will not be presumed from the mere payment of the purchase money from the assets of the firm that the real property was intended to be held in partnership, and not in cotenancy: *Smith v. Jackson*, 2 Edw. Ch. 28; *Cox v. McBurney*, 2 Sandf. 561; *Wooldridge v. Wilkins*, 3 How. (Miss.) 360. But see *Collumb v. Read*, 24 N. Y. 513. One of two partners purchased real estate and paid for it with the note of the firm; the expenses connected with the purchase, the discount on the original note, the renewals of the same, and the taxes levied upon the lot, were charged to his individual account by the direction of the other partner. The property was held to have been purchased on individual account, and the partner, and not the firm, was held entitled to the profits arising from the real estate: *Hay's Appeal*, 91 Pa. St. 265. For a case in which lands were held as partnership property, see *Causler v. Wharnton*, 62 Ala. 358.

¹ *Tidd v. Rines*, 26 Minn. 201.

² *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Traphagen v. Burt*, 67 N. Y. 30; *Holmes v. McCray*, 51 Ind. 358; 19 Am. Rep. 735; *Gibbons v. Bell*, 45 Tex. 419; *Speyer v. Desjardins*, 32 N. E. Rep. 283; *Case v. Seger*, 4 Wash. St. 492; *Fountain v. Menano*, 53 Minn. 443; 39 Am. St. Rep. 617. See *Bunnell v. Taintor*, 4 Conn. 568. An agreement to divide profits arising from the sale of land is not required to be in writing: *Babcock v. Read*, 99 N. Y. 609; *Bruce v. Hastings*, 41 Vt. 380; 98 Am. Dec. 592; *Kilbourne v. Latta*, 5 Mackey (D. C.), 304; 60 Am. Dec. 373; *Benjamin v. Zell*, 100 Pa. St. 33; *Everhart's Appeal*, 106 Pa. St. 349;

concerning an interest in land, and must be in writing.¹ Thus, an execution was issued against a debtor, and a surety who was ultimately bound, and who was informed that no property belonging to the debtor could be found, desired the sheriff to levy the execution on a lot for which the debtor held a bond for a conveyance, and said he would see that the title should be made good to the purchaser. In an action by a person who became the purchaser at the sheriff's sale, in reliance on this promise, and who sought to obtain a conveyance of the legal title, without paying the surety the purchase money, it was held that the promise was void because not made in writing.² An agreement for the opening of a street near a party's land has been held to require a writing.³ In Virginia, an agreement to pay an additional amount for

Carr v. Leavitt, 54 Mich. 540; *Snyder v. Wolford*, 33 Minn. 175; 53 Am. Rep. 22; *Miller v. Kendig*, 55 Iowa, 174; *Parker v. Siple*, 76 Ind. 345; *Hall v. Hall*, 8 N. H. 129; *Graves v. Graves*, 45 N. H. 323; *Mahagan v. Mead*, 63 N. H. 130.

¹ *Duvall v. Peach*, 1 Gill, 172; *Reyman v. Mosher*, 71 Ind. 596.

² *Bryan v. Jamison*, 7 Mo. 106. See *Bishop v. Little*, 5 Greenl. 367. A verbal release of a covenant of warranty has been considered inoperative: *Bliss v. Thompson*, 4 Mass. 488. Whether an agreement to pay off encumbrances was not required to be by deed appears to have been considered a doubtful question by the court in New York: *Duncan v. Blair*, 5 Denio, 196. A verbal guaranty of title, or an agreement to pay the expense of searching the title, need not be in writing: *Jeakes v. White*, 6 Ex. 873; *Huntington v. Wellington*, 12 Mich. 10; *Doggett v. Patterson*, 18 Tex. 158. See, also, *Evans v. Hardeman*, 15 Tex. 480; *Natchez v. Vandervelde*, 31 Miss. 706; *Miller v. Roberts*, 18 Tex. 16; 67 Am. Dec. 688. Nor is a deed necessary for mere agreements to deliver or account for the proceeds of land: *Ford v. Finney*, 35 Ga. 258; *Graves v. Graves*, 45 N. H. 323; *Gwaltney v. Wheeler*, 26 Ind. 415.

³ *Richter v. Irwin*, 28 Ind. 26. And the same has been held concerning an agreement not to build within three feet of the street: *Wolfe v. Frost*, 4 Sand. Ch. 72. See *Rice v. Roberts*, 24 Wis. 461; 1 Am. Rep. 195. Agreements that a certain trade shall not be carried on on premises or certain buildings used thereon need not be by deed: *Bostwick v. Leach*, 3 Day, 476; *Leinau v. Smart*, 11 Humph. 308; *Fleming v. Ramsey*, 46 Pa. St. 252; nor need agreements for the payment of taxes: *Preble v. Baldwin*, 6 Cush. 549; *Brackett v. Evans*, 1 Cush. 79. There may be a substitution of appraisers of the value of land by parol although the original appointment may have been by writing: *Stark v. Wilson*, 3 Bibb, 476.

land if coal were found in it has been held void, because not by deed.¹

§ 53. **Release of damages affecting land.**—When land has been condemned under the proceedings authorized under the power of eminent domain, an agreement releasing damages is not required to be in writing.² On the same principle, an agreement not to claim damages for the flowing of one's land, if another party will erect a dam and mill, need not be in writing.³ An agreement of this character is not the conferring of any right, interest, or easement in land, and amounts to no more than a waiver of a claim for pecuniary damages.⁴ An agreement to compensate an owner of land for the expenses and outlay incurred by him, caused by the illegal appropriation of his land by a municipal corporation for the purpose of widening a street, does not require a writing.⁵ An interest in contingent profits to arise from sales

¹ *Heth v. Wooldridge*, 6 Rand. 605; 18 Am. Dec. 751. See *Howe v. O'Mally*, 1 Murph. 237; 3 Am. Dec. 693; *Fraser v. Child*, 4 Smith, E. D. 153; *Garret v. Malone*, 8 Rich. 335. As to whether an agreement to pay back a certain proportion of the purchase money, in case the land shall not equal the amount named in the deed, must be by deed, see *Mott v. Hurd*, 1 Root, 73; *Bradley v. Blodget*, Kirby, 22; 1 Am. Dec. 11; *Green v. Vardiman*, 2 Blackf. 324; *Dyer v. Graves*, 37 Vt. 369; *Metcalf v. Putnam*, 9 Allen, 100. Where the owner of land conveys the coal under the surface, he retains the title to anything beneath the coal, and has the right of access to it, though the deed does not expressly reserve such right: *Chartier's Block Coal Co. v. Mellon*, and *Mansfield's C. & O. Co. v. Mellon*, 152 Pa. St. 286; 34 Am. St. Rep. 645.

² *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325; *Fuller v. Plymouth Commissioners*, 15 Pick. 81.

³ *Smith v. Goulding*, 6 Cush. 154.

⁴ See, also, *Fitch v. Seymour*, 9 Met. 462; *Clement v. Durgin*, 5 Greenl. 14. If however, a contract with the owner is contemplated by the statute authorizing the taking, the contract must be in writing: *Phillips v. Thompson*, 1 Johns. Ch. 131. See, also, *McCabe v. Fitzpatrick*, 2 Leg. Gaz. 138. A deed is required whenever an interest in land is sold regardless of the nature of the consideration, provided the law recognizes it as a good consideration: *Burlingame v. Burlingame*, 7 Cowen, 92; *Jack v. McKee*, 9 Pa. St. 235; *Helm v. Logan*, 4 Bibb, 78; *Baxter v. Kitch*, 37 Ind. 554; *Dowling v. McKenney*, 124 Mass. 478.

⁵ *Coleman v. Chester*, 14 S. C. 216.

of real estate to be made in the future is not an interest in land.¹

§ 54. **Agreement to devise interests in land.**—The principle is firmly established that a promise to make a will of a testator's real property is a contract for the conveyance of lands, and must be by a deed or written instrument;² and when made in this manner, upon a sufficient consideration, it is valid and binding, and will be enforced by a court of equity.³

§ 55. **Application of rules relative to specific performance.**—But in the case of an oral agreement of this character founded upon a valuable consideration, the rules relating to specific performance in general apply. Thus, payment of money will not be sufficient to take the case out of the statute.⁴ But when possession has been taken, improvement made, or other acts have been done, which in equity are considered part performance, such an agreement will be enforced.⁵ "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his property to a particular individual, or for a particular purpose, as well by will as by a conveyance

¹ *Benjamin v. Zell*, 100 Pa. St. 33. See *Babcock v. Read*, 50 N. Y. Sup. Ct. 126.

² *Gould v. Mansfield*, 103 Mass. 408; 4 Am. Rep. 573; *Harwood v. Goodright*, Cowp. 87; *Walpole v. Orford*, 3 Ves. 402; *Caton v. Caton*, Law R. 1 Ch. 137; 2 H. L. Cas. 127.

³ *Wright v. Tinsley*, 30 Mo. 389; *Davison v. Davison*, 2 Beasl. 246; *Van Dyne v. Vreeland*, 3 Stock. 370; *Maddox v. Rowe*, 23 Ga. 431; *Johnson v. Hubbell*, 2 Stockt. Ch. 332; 67 Am. Dec. 773; *Brinker v. Brinker*, 7 Pa. St. 53; 2 Story Eq. Juris. §§ 785, 786; 3 Parsons on Cont. 406.

⁴ *Harder v. Harder*, 2 Sandf. Ch. 17.

⁵ *Gupton v. Gupton*, 47 Mo. 37; *Mundorff v. Kilbourn*, 4 Md. 459; *Campbell v. Taul*, 3 Yerg. 548; *Johnson v. Hubbell*, 2 Stockt. Ch. 332; 67 Am. Dec. 773; *Quackenbush v. Ehle*, 5 Barb. 469. And see *Frisby v. Parkhurst*, 29 Md. 58; 96 Am. Dec. 503; *Semmes v. Worthington*, 38 Md. 298; *Fardy v. Williams*, 38 Md. 493; *Brinker v. Brinker*, 7 Pa. St. 53.

to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man, in this way, to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction."¹

§ 56. **Parol evidence.**—An agreement for the execution of a written contract to sell land must also be by written instrument. For this is an agreement that one of the parties shall ultimately sell the land.² Evidence is not admissible to prove that a deceased person had *said*, during his lifetime, that he had sold the land of which he was the presumable owner to the plaintiff. This principle is beyond question. The introduction of such evidence would lead to the same consequences as evidence by parol of a contract for the sale of the land.³

§ 57. **Growing crops.**—Upon the question whether growing crops, and other natural products of the soil, are such interests in land that a deed or written instrument

¹ Chancellor Williamson, in *Johnson v. Hubbell*, 2 Stockt. Ch. 332, 336; 67 Am. Dec. 773. The chancellor continued: "In the case of *Rivers v. Executors of Rivers*, 3 Desaus. Eq. 195, 4 Am. Dec. 609, the court, in sustaining the propriety of a court of equity recognizing and enforcing such an agreement, very properly remarked that a man might renounce every power, benefit, or right which the laws give him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral": See, also, *Izard v. Izard's Exrs.*, 1 Desaus Eq. 116; *Lewis v. Maddocks*, 6 Ves. Jr. 150; *Fortescue v. Hennah*, 19 Ves. Jr. 71; *Jones v. Martin*, 3 Anstr. 882; *Podmore v. Gunning*, 7 Sim. 644; *Moorhouse v. Colvin*, 9 Eng. L. & Eq. 136; *Browne on Statute of Frauds*, § 263.

² *Sands v. Thompson*, 43 Ind. 18; *Trammell v. Trammell*, 11 Rich. 471; *Ledford v. Ferrell*, 12 Ired. 285; *Yates v. Martin*, 1 Chand. 118; *Lawrence v. Chase*, 54 Me. 196.

³ *White v. Coombs*, 27 Md. 489. Growing timber is a part of the real estate, and must be conveyed by deed: *Alt v. Groschlose*, 61 Mo. App. 404.

is required for their conveyance there has been a marked, and perhaps irreconcilable, conflict in the decisions. It is not our intention to enter into an exhaustive examination of the subject, but to state briefly what seem to be the proper conclusions to be deduced from the authorities. In England, the decisions have been peculiarly inconsistent. In one case Lord Littledale said: "I am of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the meaning of the fourth section of the statute of frauds. The words, 'lands, tenements, and hereditaments,' in that section, appear to me to have been used by the legislature to denote a fee simple, and the words, 'any interest in or concerning them,' were used to denote a chattel interest, or some interest less than a fee simple. . . . The legislature contemplated an interest in land which might be made the subject of sale. I think, therefore, they must have contemplated the sale of an interest which would entitle the vendee either to the reversion or to the present possession of the land."¹ Where there was a verbal agree-

¹ *Evans v. Roberts*, 5 Barn. & C. 829. In that case the defendant had verbally agreed to purchase of the plaintiff a cover of potatoes, then in the ground, to be turned up by the plaintiff, for a certain price. The court held a writing was not necessary, and Justice Holroyd said: "This is to be considered a contract for the sale of goods and chattels, to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land, while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of the statute. He clearly had no interest so as to entitle him to the possession of the land for a period, however limited, for he was not to raise the potatoes. . . . The plaintiff did not acquire by the contract an interest in any specific portion of the land. The contract only binds the vendor to sell and deliver the potatoes at a future time, at the request of the buyer, and he was to take them away." Prior to this, in the case of *Emmerson v. Heelis*, 2 Taunt. 38, where an action was brought for the breach of a contract to remove a quantity of turnips, which were growing at the time, and were sold by auction, it was said by C. J. Mansfield: "Now as to this being an interest in land, we do not see how it can be distinguished from the

ment by a defendant to buy of the plaintiff a quantity of timber standing on the ground, though the plaintiff was having it cut down, the court held the agreement might be enforced, and was not void because not in writing.¹ Whether the produce is fully grown, or is in a state of immaturity, has no effect upon the question whether it is an interest in land or not.²

§ 58. **Occupancy of the land.**—If the purchaser is entitled to the occupancy of the land during the time elapsing between the sale and contemplated delivery for the purpose of tilling the soil, the contract is then for an interest in land, and requires a deed or written instrument.³ But the fact that the produce may remain in the soil, and will, therefore, derive a certain degree of nourishment from it, does not make the contract for an interest in land, as, it is said, the land is to be considered a mere *warehouse*, till the defendant may have the opportunity of removing the produce.⁴

case of hops.” The chief justice referred to the case of *Waddington v. Brestow*, 2 Bos. & P. 452. These cases were referred to in *Evans v. Roberts*, *supra*, and the decision in *Emmerson v. Heelis* rejected. See *Parker v. Staniland*, 11 East, 362; *Sainsbury v. Matthews*, 4 Mees. & W. 343.

¹ *Smith v. Surman*, 9 Barn. & C. 561.

² *Bricker v. Hughes*, 4 Ind. 146; *Sherry v. Picken*, 10 Ind. 375; *Bull v. Griswold*, 19 Ill. 631; *Bryant v. Crosby*, 40 Me. 9; *Marshall v. Ferguson*, 23 Cal. 65; *Davis v. McFarlane*, 37 Cal. 636; 99 Am. Dec. 340; *Johnson v. Moss*, 45 Cal. 515. But see *Powell v. Rich*, 41 Ill. 466.

³ *Evans v. Roberts*, 5 Barn. & C. 829. Lord Littledale said in that case: “The legislature contemplated an interest in land which might be made the subject of sale. I think, therefore, they must have contemplated a sale of an interest which would entitle the vendee either to the reversion or the present possession of the land.” Mr. Justice Holyrod declared that the “plaintiff clearly had no interest in the land, so as to entitle him to the possession of the land for a period, however limited, for he was not to raise the potatoes.” In fact, a contract of this kind is equivalent to a lease.

⁴ Bayley, J., in *Parker v. Staniland*, 11 East, 362. In that case Lord Ellenborough said: “It is probable that in the course of nature the vegetation was at an end; but be that as it may, they [the produce, which consisted of potatoes] were to be taken by the defendant immediately, and it was quite accidental if they derived any further advantage from

§ 59. **Distinction between *fructus industriales* and *prima vestura*.**—A distinction has been made between sales of the *fructus industriales*, which require annual or periodical culture, including grain, vegetables, etc., and sales of the *prima vestura*, comprising growing trees and the like.¹ This distinction is observed in Pennsylvania, and there the rule prevails that all products coming under the denomination of *prima vestura* are interests in land, and can be conveyed only by deed.² Thompson, J., upon this subject, said: "The distinction in the English books between the *prima vestura* and the *fructus industriales* of land, namely, the natural growths and the products of agriculture, has always been regarded with us. We have uniformly held that growing *crops* pass to administrators and not to heirs, and that they are liable to be seized and sold on execution as personal chattels of a debtor. So in regard to the former, whenever we have spoken on the subject there is a concurrence likewise in the doc-

being in the land." See, also, *Warwick v. Bruce*, 2 Maule & S. 208, where Lord Ellenborough said, concerning a sale of a quantity of potatoes growing in the ground: "Whether at the time of sale they were covered with earth *in the field or in a box*, still it was a sale of a chattel." See *Cutler v. Pope*, 13 Me. 377.

¹ *Scorell v. Boxall*, 1 Younge & J. 398; *Rodwell v. Phillips*, 9 Mees. & W. 503. *Rodwell v. Phillips* was a case where a contract had been made for the sale of all the growing fruit and vegetables on a portion of the vendor's premises. The question was whether a stamp was necessary under the act requiring a stamp upon agreements for any interest in land. The court held that it was, Lord Abinger saying: "The difference appears to be between annual productions raised by the labor of man, and the annual productions of nature, not referable to the industry of man, except at the period when they were first planted"; and in another place remarked: "Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied upon in execution, under a writ of *fi. fa.* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir at law, but to some other person": See, also, *Dunne v. Ferguson*, 1 Hayes, 540; *Jones v. Flint*, 10 Ad. & E. 753; *Teall v. Auty*, 4 Moore, 542; *Yale v. Seely*, 15 Vt. 221; *Carrington v. Roots*, 2 Mees. & W. 248; *Teall v. Auty*, 2 B. & B. 101; *Warwick v. Bruce*, 2 Maule & S. 205; *Washbourn v. Burrows*, 1 Ex. 107; *Crosby v. Wadsworth*, 6 East, 602.

² *Pattison's Appeal*, 61 Pa. St. 294; 100 Am. Dec. 637; *Bowers v. Bowers*, 95 Pa. St. 477.

trine.”¹ But the rule is not there understood to be absolute or unqualified, but is subject to the modification that if an immediate severance is contemplated a reservation of growing timber is personalty, but if such immediate severance is not in view, it is an interest in land and must pass by deed.²

§ 60. **This distinction in New York.**—This rule also obtains in New York, and in that state poles whose use was necessary in the cultivation of hops, and which were taken down for the purpose of gathering the crop, and had been piled in the yard to be replaced when the season for hop raising returned, have been considered a part of the real estate.³ Therefore, in that state a valid sale of trees growing on land can be made only by a written instrument.⁴ The court referred to the conflict between the decisions, and observed that the question had not been decided before in that state, and said: “We are,

¹ Pattison’s Appeal, *supra*. The learned justice, continuing, said: “In *Yeakle v. Jacob*, 33 Pa. St. 376, this court held, that a grant to one of a perpetual right to enter and cut timber on another’s land for the purpose of repairing fences, was within the statute of frauds and perjuries; that such a right is an interest in land, and cannot pass by parol. This case was cited and applied in *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203. Many, if not all the authorities bearing on this question, may be found referred to in the arguments and opinions in these two cases, and I will not burden this opinion with them. We think the principle of them is indisputable. Nothing can be drawn from the case of *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760, and subsequent cognate cases, in which this court has held to the right of severance of a freehold estate into one or more estates of freehold within the same boundaries; that is, the mineral under the surface to constitute a separate estate from the surface land. The distinctiveness of the purposes and uses of these interests, renders the division natural and not productive of any confusion, and very important to both interests. But it was never held that either was a personal chattel, or to be so treated. Nor are we for a moment to doubt but a conveyance of all the timber on a man’s land, to be taken at discretion, is not an interest in land which may be conveyed by an instrument in writing. That is not our question; it is whether such an interest is personalty or realty, and we unhesitatingly hold it to be the latter.”

² *McClintock’s Appeal*, 71 Pa. St. 365. In that case *Pattison’s Appeal*, 61 Pa. St. 294; 100 Am. Dec. 637, is distinguished and approved.

³ *Bishop v. Bishop*, 11 N. Y. 123; 62 Am. Dec. 68.

⁴ *Green v. Armstrong*, 1 Denio, 550.

therefore, as it seems to me, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve, and especially if it be equally applicable to other and analogous cases." From an examination of the authorities the court drew the following distinction: "An interest in personal chattels may be created without a deed or conveyance in writing, and a contract for their sale may be valid, though by parol. But an interest in that which is land can only be created by deed or written conveyance, and no contract for the sale of such an interest is valid unless in writing. It is not material, and does not affect the principle that the subject of the sale will be personal property when transferred to the purchaser. If when sold it is in the hands of the seller a part of the land itself, the contract is within the statute. These trees were part of the defendant's land and not his personal chattels. The contract for their sale and transfer being by parol was therefore void."¹

§ 61. **Other States.**—In New Jersey, the rule is that trees and such other products as are the natural and permanent growth of the soil cannot be deemed as possessing the nature of emblements or *fructus industriales*; they are a part of the inheritance, and can become personalty only by an actual severance, or a severance in law as the effect of a proper instrument of writing.² This distinction is made by the courts likewise in New Hampshire³ and Indiana,⁴ and it seems also in Vermont⁵ and Missis-

¹ *Green v. Armstrong*, *supra*. See, also, *Warren v. Leland*, 2 Barb. 613; *Bank of Lansingburgh v. Crary*, 1 Barb. 542; *Pierrepont v. Barnard*, 6 N. Y. 292; *Kilmore v. Howlett*, 48 N. Y. 569; *Boyce v. Washburn*, 4 Hun, 792.

² *Slocum v. Seymour*, 36 N. J. L. 138; 13 Am. Rep. 432; *O'Donnell v. Brehen*, 36 N. J. L. 257. See *Westbrook v. Eager*, 1 Har. (Del.) 81.

³ *Howe v. Batchelder*, 49 N. H. 204; *Kingsley v. Holbrook*, 45 N. H. 313; 86 Am. Dec. 173; *Putney v. Day*, 6 N. H. 430; 25 Am. Dec. 470.

⁴ *Owens v. Lewis*, 46 Ind. 488; 15 Am. Rep. 295; *Cool v. Peters Box & Lumber Co.*, 87 Ind. 531; *Terrell v. Frazier*, 79 Ind. 473. See *Armstrong v. Lawson*, 73 Ind. 498.

⁵ *Buck v. Pickwell*, 27 Vt. 157; *Ellison v. Brigham*, 38 Vt. 64; *Fitch*

ssippi.¹ In a recent case in England, it seems that the distinction made in the early cases as to the nature of the crop has been rejected.²

§ 62. Opposite view where this distinction is not observed.—Several of the American courts have refused to observe the distinction sought to be made, and their decisions are thus in harmony with the latest English case. We can see no just reason for this distinction. If the product is attached to or imbedded in the soil, its character as realty or personalty ought to be determined, independently of the inquiry whether it requires periodical care and cultivation. This is the rule that prevails in Maine, Kentucky, Maryland, and perhaps Connecticut.³ In Massachusetts, growing timber may be transferred without a deed;⁴ and so may a building sold without the land on which it stands.⁵ But if a severance from the land is not contemplated, and it is intended to pass a title to the standing crop as such, a deed or writing is required.⁶ The license to enter upon the land may be revoked before an actual entry and severance, and no title having passed

v. Burk, 38 Vt. 687; *Sterling v. Baldwin*, 42 Vt. 306. In the last case, however, the court seems to sanction the rule that no distinction should be made while admitting the correctness of its other decisions, saying: "We are not supposed to give that opinion the force of authority beyond the very point of judgment."

¹ *Harrell v. Miller*, 35 Miss. 700; 72 Am. Dec. 154. See, also, *Powers v. Clarkson*, 17 Kan. 218; *Carrier v. Gordon*, 21 Ohio St. 605; *Kerr v. Connell*, Bert. 133; *Daniels v. Bailey*, 43 Wis. 566; *Young v. Lego*, 36 Wis. 394; *Jackson v. Evans*, 44 Mich. 510; *Lyle v. Shinnebarger*, 17 Mo. App. 66.

² *Marshall v. Green*, 1 C. P. D. L. R. 35. This decision was made in 1875 in the common pleas division of the English high court of justice.

³ *Cutler v. Pope*, 13 Me. 377. See *Safford v. Annis*, 7 Greenl. 168; *Bryant v. Crosby*, 40 Me. 9, 23; *Erskine v. Plummer*, 7 Greenl. 447; 22 Am. Dec. 216; *Caine v. McGuire*, 13 Mon. B. 340; *Byassee v. Reese*, 4 Met. (Ky.) 372; 83 Am. Dec. 481; *Smith v. Bryan*, 5 Md. 151; 59 Am. Dec. 104; *Bostwick v. Leach*, 3 Day, 476; *Poor v. Oakman*, 104 Mass. 316; *Douglas v. Shumway*, 13 Gray, 502.

⁴ *Clafin v. Carpenter*, 4 Met. 580; 38 Am. Dec. 381.

⁵ *Shaw v. Carbrey*, 13 Allen, 462.

⁶ *Poor v. Oakman*, 104 Mass. 309; *Giles v. Simonds*, 15 Gray, 441; 77 Am. Dec. 372. See *Knox v. Haralson*, 2 Tenn. Ch. 232.

to the purchaser he will have no right to enter upon the land to remove the property.¹ It cannot be said to be settled that the character of the crop is or is not the criterion by which to determine the necessity for a deed. But our view, as we have stated, is that the distinction is a refinement without practical value and unfounded in reason. Upon the subject, generally, the principle running through the authorities seems to be that if the agreement provides or fairly implies that the purchaser is to have possession of the land, *as part of the bargain*, then it becomes an agreement for an interest in land. But if the right to enter is simply incidental to the contract, and is not expressly provided for by the contract, the sale is not of land but of goods merely.² It was held in Michigan, where an oral agreement was made for the conveyance of a farm and also for the transfer of the wheat growing thereon, that, as the former agreement was void because not in writing, the latter being connected with it was also void, though otherwise it might not be.³

¹ *Poor v. Oakman*, 104 Mass. 309. And see *Drake v. Wells*, 11 Allen, 141; *Giles v. Simonds*, 15 Gray, 441; 77 Am. Dec. 372; *Nettleton v. Sikes*, 8 Met. 34; *Nelson v. Nelson*, 6 Gray, 385; *Stearns v. Washburn*, 7 Gray, 187; *Lamson v. Patch*, 5 Allen, 586; 81 Am. Dec. 765; *Burton v. Scherpf*, 1 Allen, 133; 79 Am. Dec. 717; *Whitmarsh v. Walker*, 1 Met. 313; *Boyce v. Washburn*, 4 Hun, 792; *White v. Foster*, 102 Mass. 375.

² See *Sterling v. Baldwin*, 42 Vt. 306. A contract by a creditor to take control of a debtor's plantation and sell the crops when grown was held not required to be in writing: *Burkham v. Mastin*, 54 Ala. 122. A contract made by a child with his father to release to his brothers all claim in expectancy to the father's estate, in consideration of a conveyance of land to him, need not be in writing: *Galbraith v. McLain*, 84 Ill. 379. Where an oral agreement was made by the owner of land, giving a person the right to set out a number of trees, and to receive a portion of the product during the lifetime of the trees, it was held after part performance not to be void by the statute of frauds: *Wiley v. Bradley*, 60 Ind. 62.

³ *Jackson v. Evans*, 44 Mich. 510. Under a parol contract whereby plaintiff agreed that defendant might cut from his land a quantity of wood, for which the defendant was to execute to plaintiff a deed for the land, it was held that the plaintiff could not recover on assumpsit for the value of the wood taken by defendant, but as defendant did not seek to avoid the agreement, he was bound by the terms of the original contract: *Green v. N. C. R. R. Co.*, 77 N. C. 95. See generally *Brittain v.*

§ 63. **Easements are interests in lands.**—By the common law, incorporeal hereditaments could be transferred only by deed, and this, of course, still remains the law. Hence, a right to a drain running through adjoining land can be created only by deed.¹ So a legal right of way can pass only by deed;² and the right to be buried in a particular vault requires a writing for its creation.³ Pipes for the conveyance of water have been deemed an interest in land;⁴ so have pipes laid in the ground for the conveyance of gas.⁵ A right of way cannot exist by parol; it must be created by deed.⁶ And when an easement

McKay, 1 Ired. 265; 35 Am. Dec. 738; *Turner v. Piercy*, 40 Md. 212; 17 Am. Rep. 591; *Brown v. Sanborn*, 21 Minn. 402; *Bull v. Griswold*, 19 Ill. 631; *Davis v. McFarlane*, 37 Cal. 634; 99 Am. Dec. 340; *Marshall v. Ferguson*, 23 Cal. 65. In Indiana it is held that a contract for the sale of growing trees or standing timber is within the statute of frauds: *Cool v. Peters' Box & Lumber Co.*, 87 Ind. 531; *Armstrong v. Lawson*, 73 Ind. 498.

¹ *Hewlins v. Shippam*, 5 Barn. & C. 221. In *Fentinam v. Smith*, 4 East, 107, Lord Ellenborough said: "The title to have the water flowing in the tunnel over defendant's land could not pass by parol license without deed, and the plaintiff could not be entitled to it, as stated in his declaration, by reason of his possession of the mill; but he had it by license of the defendant, or by contract with him, and, if by license, it was revocable at any time."

² *Lord Denman, C. J.*, in *Tickle v. Brown*, 4 Ad. & E. 369.

³ *Bryan v. Whistler*, 8 Barn. & C. 298. See, also, *Cocker v. Cowper*, 1 Crompt. M. & R. 418; *Monk v. Butler*, Cro. Jac. 574; *Hoskins v. Robins*, 2 Vent. 123; *Harrison v. Parker*, 6 East, 154. Under a deed by tenants in common, reciting that a small portion of the land has been laid off for burial purposes, and excepting and reserving to the grantors and their heirs the right of future interment, and a right of way across the granted premises, the heirs of the grantors, having succeeded to the latter's rights, may protect the graves and monuments from spoliation by a person claiming under the deed: *Mitchell v. Thorne*, 134 N. Y. 536; 30 Am. St. Rep. 699.

⁴ *Rex v. Bath*, 4 East, 609.

⁵ *Rex v. Brighton Gas Co.*, 5 Barn. & C. 466. And see *Philbrick v. Ewing*, 97 Mass. 133, 136; *Williams v. Morris*, 8 Mees. & W. 488.

⁶ *Fitch v. Seymour*, 9 Met. 462; *Chapin v. Noyes*, 6 Wend. 461. In *Hays v. Richardson*, 1 Gill & J. 366, it was held that a grant of a right to open a road must be acknowledged and recorded in accordance with the recording laws. This was also held in *Wright v. Freeman*, 5 Har. & J. 467. See, also, *Cook v. Stearns*, 11 Mass. 533; *Russell v. Scott*, 9 Cowen, 279; *Morse v. Copeland*, 2 Gray, 302; *Houston v. Laffee*, 46 N. H. 505, 507; *Curtis v. Jackson*, 13 Mass. 507; *Anon. v. Deberry*, 1 Hayw.

has been once created, it can be conveyed only by deed.¹ The right to abut and erect a dam upon the land of another for a permanent purpose can be granted only by deed.² So an agreement by an occupant of leased lands to permit a railroad company for a term of years to lay a track on the lands and take stone and soil therefrom must be in writing, or it will be void.³ The charter of a water power company authorized them to divert the water of a river on obtaining the written consent of the riparian owners. But this, as it was held, did not dispense with the necessity of a deed. Such a right is an incorporeal hereditament, and the consent alone was nothing but a license.⁴ An agreement on the part of a railroad company to establish a turn-out track and stopping place near the land of another, and to stop there with freight and passenger trains, must be in writing, because it would create a negative easement in the company's land.⁵

248; *Hull v. Chaffee*, 13 Vt. 150; *Bullen v. Runnells*, 5 N. H. 255; 9 Am. Dec. 55; *Thompson v. Gregory*, 4 Johns. 81; 4 Am. Dec. 255.

¹ *Ferrell v. Ferrell*, 1 Baxt. 329. The right to overflow land of a party without paying damages cannot be established by proof of a parol agreement or license made with his grantors: *Seidensparger v. Spear*, 17 Me. 123; 35 Am. Dec. 234. But the damages occasioned by flowing may be waived by parol: *Clement v. Durgin*, 5 Me. 9. Trees on the land and the right of pasturage cannot be reserved by the grantor by a parol contract: *Dodder v. Snyder*, 67 N. W. Rep. 1101.

² *Moulton v. Faught*, 41 Me. 298. Equity will enforce a parol agreement to construct a ditch and keep it in repair for the mutual benefit of several parties, if in pursuance of this agreement they have performed labor and paid their share of the expenses: *Gooch v. Sullivan*, 13 Nev. 78.

³ *Cayuga R. R. Co. v. Niles*, 20 N. Y. Sup. Ct. 170. But a contract of this nature will, while unrevoked, justify acts done under it as an oral license: *Cayuga R. R. Co. v. Niles*, 20 N. Y. Sup. Ct. 170.

⁴ *Veghte v. Raritan etc. Co.*, 19 N. J. Eq. 142.

⁵ *Pitkin v. Long Island R. R. Co.*, 2 Barb. Ch. 221; 47 Am. Dec. 320. An agreement as part of the consideration to pay a mortgage need not be in writing: *Tuttle v. Armstead*, 53 Conn. 175. It has been held that an oral agreement to refund *pro rata* for a deficiency in the quantity of land can be enforced: *Sherrill v. Hagan*, 92 N. C. 345. So can an oral promise by a vendee to pay a bond made by his vendor to the latter's vendor: *Ford v. Finney*, 35 Ga. 258. So can an oral agreement to purchase a mortgage on the owner's land, sell the same, and after de-

ducting the indebtedness, pay the balance to such owner: *McGinnis v. Cook*, 57 Va. 36; 52 Am. Rep. 115. So can an oral agreement between joint owners of land about to be sold at foreclosure, that one shall buy and hold for both: *Cornell v. Ithaca etc. R. R. Co.*, 61 How. Pr. 184. The agreement for the sale of the interest of a *cestui que trust* in land must be in writing: *Holmes v. Holmes*, 86 N. C. 205; *McClain v. McClain*, 57 Iowa, 167; *Richards v. Richards*, 9 Gray, 313. So must an agreement to rescind a deed: *Davis v. Inscoe*, 84 N. C. 396; *McEwan v. Ortman*, 34 Mich. 325. An agreement to advance money to enable another to purchase land need not be in writing: *Wetherbee v. Potter*, 99 Mass. 354. But if he is to take the title in his own name the rule is different: *Spencer v. Lawton*, 14 R. I. 494; *Wetmore v. Neuberger*, 44 Mich. 362. A promise to pay part of the purchase price to a third party is not required to be in writing: *Strong v. Kamm*, 13 Or. 172. An agreement to purchase land must be in writing: *Parsons v. Phelan*, 134 Mass. 109; *Henderson v. Hudson*, 1 Munf. (Va.) 510; *Linscot v. McIntire*, 15 Me. 201; 33 Am. Dec. 602; *McCormick's Appeal*, 57 Pa. St. 54; 98 Am. Dec. 191. An oral agreement made for the purpose of saving a foreclosure, to the effect that the mortgagor should convey his interest to the mortgagee, and that he should pay a certain amount, permit the mortgagor to find a purchaser, and thereupon would convey to the purchaser and deliver any surplus remaining over the amount due to the mortgagor, was held valid: *Reyman v. Mosher*, 71 Ind. 596. See, also, *Hunt v. Elliott*, 80 Ind. 245; 41 Am. Rep. 794. An agreement by a purchaser of property sold under foreclosure that he will reconvey to the mortgagor for the amount paid for the property must be in writing: *Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273. A grantee is bound by an oral promise to pay taxes which are a lien on the land: *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 549. But see *Duncan v. Blair*, 5 Denio, 196.

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CHAPTER IV.

THE PARTIES TO A DEED.

PART I.

WHO MAY CONVEY BY DEED.

- § 64. Legal capacity to convey—General comments.
- § 65. Capacity to take or transfer real estate governed by the law *rei sitæ*.
- § 66. Assignment for benefit of creditors.
- § 67. Disability of insanity.
- § 68. Weakness of mind.
- § 69. Evidence on issue of mental unsoundness.
- § 70. Nervous excitement.
- § 71. Deed of person deaf and dumb.
- § 72. Insane husband joining in wife's deed.
- § 73. Deed, when voidable.
- § 74. Deed, when void.
- § 75. Deed, by whom may be avoided.
- § 76. Restoration of consideration.
- § 77. Ratification of deed.
- § 78. Effect of grantor's subsequent insanity on contract of purchase.
- § 79. Disability from intoxication.
- § 80. Degree of intoxication.
- § 81. Deeds made under duress.
- § 82. Threat of legal proceedings.
- § 83. Grantor's will power.
- § 84. Deeds made under undue influence.
- § 85. Disability of infancy.
- § 86. Deed of minor voidable only.
- § 87. Right of disaffirmance.
- § 88. Whether affirmance of infant's deed may be presumed from acquiescence.
- § 89. Same subject.
- § 90. Opposite view that acquiescence is not affirmance.
- § 91. Comments.
- § 92. By what means the deed of an infant may be avoided.
- § 93. Subsequent deed must be inconsistent with prior one.
- § 94. Restoring the consideration—General rule.
- § 95. Exception in Indiana.
- § 96. Where minor has not retained consideration.

- § 97. What is a sufficient ratification of an infant's deed.
- § 98. Delivery of deed after majority.
- § 99. Purchaser with knowledge of infant's prior conveyance.
- § 100. Deeds of married women.
- § 101. Joint deed of husband and wife.
- § 102. Rule in New York.
- § 103. In Massachusetts.
- § 104. In New Jersey.
- § 105. In Ohio.
- § 106. In Pennsylvania.
- § 107. In other States.
- § 108. Deed from husband to wife.
- § 109. Joint tenants and tenants in common.
- § 110. Deeds by partners.
- § 111. Subsequent ratification.
- § 112. Deed by a disseisee.
- § 113. Right of seisin.
- § 114. Power of corporations to convey.
- § 115. Restriction from nature of corporations.

PART II.

WHO MAY TAKE BY DEED.

- § 116. The capacity of the grantee.
- § 117. Deeds to husband and wife—Common law—New York.
- § 118. Other States.
- § 119. Husband's name inserted by mistake.
- § 120. Deeds to corporations.
- § 120a. Deed to trustees of an unincorporated association.
- § 121. Question between State and corporation.
- § 122. Corporation acting in other States.
- § 123. The parties must be *in esse* at the time the conveyance is executed.

PART I.

WHO MAY CONVEY BY DEED.

§ 64. Legal capacity to convey—General comments.

In general, every person who is legally competent to bind himself by contract may convey his property by deed, or may empower another to do so for him. There are, however, certain disabilities under which persons may be laboring that render them incapable of making a valid contract. These disabilities are said to be either legal, as in the case of married women and corporations, or natural, as in the case of insane persons. The disability of infancy is either legal or natural, depending upon the circum-

stances of each particular case. Some of those who rest under a disability, rendering them, to a certain extent incapable of contracting, are permitted to convey or acquire title subject to certain restrictions.¹

§ 65. Capacity to take or transfer real estate governed by the law *rei sitæ*.—The transfer and acquisition of title to land is governed by the law prevailing in the place where the land is situated. The capacity of a person to take land is determined and controlled by the law of the *situs*. If an alien is not permitted to hold land by the laws of the country where it lies, it is immaterial what the law of his domicile may be upon the subject.² “It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances.”³ On the subject of the capacity of parties to transfer lands, Judge Story, advert- ing to the fact that if aliens are excluded by the laws of a country from holding lands, the title becomes inoperative as to them, regardless of what may be the law of their domicile, thus continues: “So, if a person is incapable from any other circumstances of transferring his immovable property by the law of the *situs*, his transfer will be held invalid, although by the law of his domicile no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity

¹ *Cutter v. Davenport*, 1 Pick. 81; 11 Am. Dec. 149; *Darby v. Mayer*, 10 Wheat. 465; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264; *United States v. Crosby*, 7 Cranch, 115; *Hosford v. Nichols*, 1 Paige, 220; *Sill v. Worswick*, 1 Black. H. 665; *Coppin v. Coppin*, 2 P. Wms. 290; *Hunter v. Potts*, 4 Term Rep. 182.

² *Huey's Appeal*, 1 Grant Cas. 51; *Kling v. Sejour*, 4 La. An. 128; *Hughes v. Hughes*, 14 La. An. 85; *Clopton v. Booker*, 27 Ark. 482; *Kerr v. Moon*, 9 Wheat. 565; *Buchanan v. Deshon*, 1 Har. & G. 280; *Sewall v. Lee*, 9 Mass. 363.

³ *McGoon v. Scales*, 9 Wall. 23, per Mr. Justice Miller. See *Barnum v. Barnum*, 42 Md. 251, 307.

may attach to him by the law of his domicile. This is the silent, but irresistible result of the principle adopted by the common law, which has no admitted exception. We may illustrate the principle by an application to cases of common occurrence under the dominion of the common law. By that law, a person is deemed a minor, and is incapable of conveying real estate, until he has arrived at the age of twenty-one years. But by the law of some foreign countries minority continues until twenty-five or even until thirty years of age. Let us then suppose a foreigner, owning lands in England or America (where the common law prevails), who is by the law of his domicile in his minority, but who is over twenty-one years of age. It is clear that he may convey his real estate in England or America, notwithstanding such domestic incapacity, for he is of the age required by the local law. On the other hand, let us suppose a married woman who is domiciled in a foreign country, and by the law of that country is incapable of alienating her real estate without the consent of her husband, owning real estate in England or in America, where she is incapable of alienating it without such consent; she cannot alienate it without the consent of her husband, and her separate act will be held *ipso facto* void by the law of the *situs*.¹

§ 66. Assignment for benefit of creditors.—The application of the rule that a transfer of real property must conform to the law of the place where it is situated, has often been made in cases of assignments for the benefit

¹ Story on Conflict of Laws, § 431. See *Saul v. His Creditors*, 5 Mart., N. S., 569; 16 Am. Dec. 212; *Phillips v. Hunter*, 2 Black. H. 402; *Goodwin v. Jones*, 3 Mass. 514; 3 Am. Dec. 173; *Blake v. Williams*, 6 Pick. 286; 17 Am. Dec. 372; *Clarke v. Graham*, 6 Wheat. 577; *Holmes v. Remsen*, 4 Johns. Ch. 460; 8 Am. Dec. 581; 20 Johns. 254; 11 Am. Dec. 269; *Milne v. Moreton*, 6 Binn. 353, 359; 6 Am. Dec. 466; *Nicholson v. Leavitt*, 4 Sand. 276; *Hosford v. Nichols*, 1 Paige, 220; *Cockerell v. Dickens*, 3 Moore P. C. C. 98, 131; *Brodie v. Barry*, 2 Ves. & B. 130; *Wiles v. Cowper*, 10 Ohio, 279; 2 Ham. 124; *Curtis v. Hutton*, 14 Ves. Jr. 537; *Birthwhistle v. Vardill*, 5 Barn. & C. 438; *Elliott v. Lord Minto*, 6 Madd. 16.

of creditors. A general assignment under the insolvent laws of one State, of all the debtor's estate, will not pass the title to real property lying in another State unless the assignment is made conformably to the laws of the latter. Thus, an assignment was made by an insolvent debtor in Connecticut of all his property, including land in Massachusetts for the benefit of his creditors under a statute of Connecticut; on the same day he conveyed the land in question to the same trustee or assignee, by a deed executed in Connecticut, which referred to the assignment for the purposes of the conveyance, and which was executed and recorded in conformity to the laws of Massachusetts; it was held that the assignment made under the provisions of the Connecticut statute was void as to land in Massachusetts, and that as the subsequent deed was ancillary to the statutory assignment, it was without consideration, and void as against creditors in Massachusetts who had attached the land after the recording of such deed.¹ A similar decision was made in New Jersey, in a

¹ *Osborn v. Adams*, 18 Pick. 246. Wilde, J., delivering the opinion of the court, said: As to the assignment under the statute of Connecticut, it is very clear that Powell's [the insolvent debtor's] title to real estate within this commonwealth could not pass thereby. The title and disposition of real estate is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass: *M'Cormick v. Sullivant*, 10 Wheat. 202. This statutory assignment, therefore, in regard to real estate situated in this commonwealth, is merely void. It can neither pass a title, nor aid one otherwise defective.

"The demandant then must rely solely on his conveyance from Powell, and this, no doubt, would be a valid title against a stranger, or anyone not claiming under him. But the tenant claims under the creditors of Powell, who attached the demanded premises in a few days after the conveyance to the demandant, and these attachments have been perfected by entry of the actions and judgments duly rendered thereon, and levy of executions in due form of law. Such being the title of the tenant, it appears to us very clear that the demandant's title cannot prevail against it. The deed to the demandant was a mere voluntary conveyance. No consideration was paid; and although the conveyance to the demandant was in trust for Powell's creditors, yet they were not parties to it, and have not discharged their debts. It is admitted that no sale or transfer of the demanded premises has been made by the demandant, nor has he in any way distributed any avails of the same. He was not

case where an insolvent debtor who was arrested in Virginia, and was in custody under civil process, petitioned for his discharge under the insolvent laws of Virginia, and in compliance with the provisions of the statute executed a deed to the sheriff of certain real estate in New Jersey, described in the schedule accompanying his petition in insolvency. A bill was filed in New Jersey to enforce the execution of the trusts upon which the deed was executed, but the court held that the general assignment could not pass title to real estate in New Jersey, and that though the deed to the sheriff was absolute upon its face, it was merely ancillary to the general assignment, and hence was burdened with the same trusts and designed to effectuate the assignment. The court also held that the deed was not only fraudulent as against subsequent creditors, but also that it was illegal and inoperative as a transfer of title to real estate, and that it would not recognize or execute the trusts arising under it.¹ "The rule rests not only upon the acknowledged principle of law applicable to all assignments, voluntary as well as legal, that the title and disposition of real estate are exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which title to it can pass; but upon the further reason that the laws of one State will not be permitted to control the trust, the action of the trustee, and the disposition of the trust property in another, the subject of the trust being real estate."²

a creditor, but a trustee only; and the trust was created by the proceedings under the statute of the State of Connecticut, of which we can take no notice. The conveyance was ancillary to those proceedings, and those being void as against Powell's creditors, it follows conclusively that there was no consideration on which the conveyance can be maintained against the title derived from those creditors. We can take no more notice of a trust created under a foreign government, than we can of a will not proved nor recorded in this commonwealth. And independent of the proceedings under the statute of Connecticut, the conveyance to the demandant was merely voluntary."

¹ *Hutcheson v. Peshine*, 16 N. J. Eq. 167; *Mosselman v. Caen*, 34 Barb. 66; *McCullough v. Rodrick*, 2 Hammond, 234; *Rodgers v. Allen*, 3 Ohio, 489. But see *Lamb v. Fries*, 2 Pa. St. 83.

² *Hutcheson v. Peshine*, *supra*.

It was held in New York, where a debtor whose residence was in Maryland, had assigned lands in New York to a trustee residing in the latter State, that the New York courts, no provision repugnant to the laws of New York appearing in the assignment, would aid in enforcing the execution of the trust at the suit of creditors residing in Maryland.¹ It has been held in Maryland that a deed executed by a debtor in Delaware, in accordance with its laws to trustees for the benefit of creditors, but which was not executed, acknowledged, and recorded in conformity with the laws of Maryland, will not transfer real estate in the latter State.²

§ 67. **Disability of insanity.**—A person who is insane is incapable of binding himself by deed or other contract.³ The law does not attempt to determine the degree of intelligence that parties must possess to bind themselves by contract. A party is presumed to have legal competency to contract when he is in the possession of mental capacity sufficient to transact business with intelligence and an understanding of what he is doing.⁴

¹ *Slatter v. Carroll*, 2 Sand. Ch. 573. See *D'Ivernois v. Leavitt*, 23 Barb. 63, 80.

² *Houston v. Nowland*, 7 Gill. & J. 480. In the District of Columbia preferences are not prohibited; in Iowa they are prohibited. It was held that a general assignment executed in the District of Columbia, conveying land situated in Iowa, was repugnant to the laws of Iowa if containing such preferences, and hence invalid: *Loving v. Pairo*, 10 Iowa, 282; 77 Am. Dec. 108. See *Cutter v. Davenport*, 1 Pick. 81; 11 Am. Dec. 149; *Wood v. Parsons*, 27 Mich. 159; *Van Nest v. Yoe*, 1 Sand. Ch. 4.

³ Lord Coke divides persons *non compos mentis* into four classes. The first is an idiot or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus qui gaudet lucidis intervallis*, and sometimes is of a good and sound memory, and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard: *Beverley's Case*, 4 Co. 124; Co. Litt. 274 a. And see *Hill v. Nash*, 41 Me. 585; 66 Am. Dec. 266; *Mulloy v. Ingalls*, 4 Neb. 115. Where a deed perfect in form is made by an insane husband and his wife of their homestead, the deed is not void, but voidable. The wife must return the consideration if she seeks to avoid the deed: *Pearson v. Cox*, 71 Tex. 246; 10 Am. St. Rep. 740.

⁴ *Hovey v. Chase*, 52 Me. 305; 83 Am. Dec. 514; *Creagh v. Blood*, 2 Jones & L. 509.

Persons who have lost their memory and understanding by old age, sickness, or other accident or infirmity, to such a degree that they are rendered incapable of transacting their business and of managing their property, are considered to be of unsound mind.¹

§ 68. **Weakness of mind.**—A deed may be avoided on the ground of insanity, when the grantor did not possess sufficient strength of mind and reason to understand the nature and consequences of his act in executing it.² And by its execution he does not make it his deed if at the time he was, from weakness of mind, incapable of understanding it if explained to him.³ But although it

¹ In re Barker, 2 Johns. Ch. 232; *Dennett v. Dennett*, 44 N. H. 531; 84 Am. Dec. 97. See *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535; 48 Am. Rep. 185. As to the effect of insanity upon the power to contract, see *United States Mortgage Co. v. Sperry*, 138 U. S. 313; *Marmon v. Marmon*, 47 Iowa, 121; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117; *Kingsbury v. Sperry*, 119 Ill. 279; 10 N. E. Rep. 8; *Stubbs v. Houston*, 33 Ala. 555; *White v. Farley*, 81 Ala. 563; 8 So. Rep. 215; *Kingman v. Harmon*, 131 Ill. 171; 23 N. E. Rep. 430; *Howell v. Griffiths*, 22 Atl. Rep. 928 (N. J. Ch. Sept. 26, 1891); *Brigham v. Fayerweather*, 144 Mass. 48; 10 N. E. Rep. 735; *Van Horn v. Keenan*, 28 Ill. 445; *Bond v. Lockwood*, 33 Ill. 213; *Day v. Seely*, 17 Vt. 542; *Valpey v. Rea*, 130 Mass. 384; *Kingsbury v. Powers*, 131 Ill. 182; 22 N. E. Rep. 479; *Chancellor v. Donnell*, 10 So. Rep. 910; *Pidcock v. Potter*, 68 Pa. St. 42; 8 Am. Rep. 181; *Rawdon v. Rawdon*, 28 Ala. 565; In re Carmichael, 36 Ala. 514; *Hull v. Louth*, 109 Ind. 315; 10 N. E. Rep. 270; 58 Am. Rep. 405; *Lacy v. Rollins*, 74 Tex. 566; 12 S. W. Rep. 314; *Curtis v. Brownell*, 42 Mich. 165; 3 N. W. Rep. 936.

² *Shelford on Lunacy*, 266. A man, ninety-one years of age and easily influenced, but capable of transacting ordinary business executed within less than one year four deeds to one who was his attorney in various matters and was his general counsel and advisor. He received as a consideration about one-sixth of the fair value of the land conveyed, and although he was not unfriendly toward his children and had no cause of quarrel with them, he seemed to have decided that his children should not receive any part of his property. After the grantor's death, an action was brought to set aside the deeds; it was held that they should be set aside: *Ross v. Payson*, 160 Ill. 349. See, also, other cases in which the decision was based on the evidence in the particular case: *Henrizi v. Kehr*, 90 Wis. 344; *Soberanes v. Soberanes*, 106 Cal. 1; *Boggess v. Boggess*, 127 Mo. 305; *Pennington v. Stanton*, 125 Mo. 688; *Turner v. Bank*, 10 Utah, 77; *Bowden v. Achor*, 95 Pa. 243.

³ *Mannin v. Ball*, 1 Smith & B. 185.

may be uncertain that the mind of the grantor was in all respects sound, still, if he has sufficient ability to execute and deliver a deed, understanding the consideration that he is to receive, and the nature of the transaction in transferring his title to another, it is considered that his mind is sufficiently sound to render his deed valid.¹ "Weakness of understanding is not of itself any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions. If a man be legally *compos mentis*, he is the disposer of his own property, and his will stands for the reason of his actions. . . . The doubtful and uncertain point at which the disposing mind disappears and where incapacity begins can be ascertained only by an examination of the particular circumstances of each case, to be duly weighed and considered by the court or jury; and in determining the question the common sense and good judgment of the tribunal must be mainly relied on."² But a deed cannot be avoided for the mere illiteracy of

¹ *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705. And see *Greer v. Greer*, 9 Gratt. 330; *Carpenter v. Carpenter*, 8 Bush, 283; *Soberanes v. Soberanes*, 106 Cal. 1; 97 Cal. 140; *Argo v. Coffin*, 142 Ill. 368; 34 Am. St. Rep. 86; *Lindsey v. Lindsey*, 50 Ill. 79; 99 Am. Dec. 489; *Willemin v. Dunn*, 93 Ill. 511; *English v. Porter*, 109 Ill. 285; *Wiley v. Ewalt*, 66 Ill. 26; *Stone v. Wilbern*, 83 Ill. 105; *Aldridge v. Aldridge*, 120 N. Y. 614; *LeGendre v. Goodridge*, 46 N. J. Eq. 419; *Kimball v. Cuddy*, 117 Ill. 213. In the absence of fraud, mere imbecility or weakness of mind is not sufficient to avoid a deed, but the grantor's insanity is sufficient to do so if it is of such a character as to induce the deed, although it may not amount to an absolute dethronement of the reason and understanding upon all matters: *Hay v. Miller*, (Neb.) 66 N. W. Rep. 1115. See, also, *Dewey v. Algire*, 37 Neb. 6; 55 N. W. Rep. 276; 40 Am. St. Rep. 268.

² *Bell, C. J.*, in *Dennett v. Dennett*, 44 N. H. 531, 538; 84 Am. Dec. 97. See *Hovey v. Hobson*, 55 Me. 256; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Carpenter v. Carpenter*, 8 Bush, 283; *Shelford on Lunacy*, 37; *Titcomb v. Vantyle*, 84 Ill. 371; *Odell v. Buck*, 21 Wend. 142; *Jackson v. King*, 4 Cowen, 207; 15 Am. Dec. 354; *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 431; *Sprague v. Duel*, 1 Clarke, 90; 11 Paige, 480; *Kennedy v. Marrast*, 46 Ala. 161. But though weakness of understanding may be insufficient to avoid a deed, it is said to supply a ground for the suspicion of improper influence. Wherever fraud can be inferred, therefore, from the circumstances of the transaction, relief against it will be given: *Jackson v. King*, 4 Cowen, 216; 15 Am. Dec. 354.

the grantors, when the deed has been read to them, and they have a reasonable understanding of the English language, are persons of ordinary ability, and not negligent of their interests.¹

§ 69. **Evidence on issue of mental unsoundness.**—If the grantor has sufficient mental ability to comprehend what he is doing, and to understand the nature of his act, his deed must be deemed that of a sane person.² The validity of a conveyance made by a person who was insane both before and after its execution, is determined by the condition of the grantor's mind at the time; and satisfactory evidence is necessary to establish the fact of his sanity.³ But mere mental weakness will not be sufficient to avoid a deed, if such weakness does not amount to in-

¹ *Bingham v. Salene*, 15 Or. 208; 3 Am. St. Rep. 152. A grantor whose mind had become weakened by age and infirmities executed a deed voluntarily and without solicitation to the grantee, in whom the grantor reposed great confidence and who had gratuitously assisted him in his business affairs. The execution of the conveyance was based on the consideration that the grantee should pay the grantor a stipulated sum every month during life, and such additional amounts of money as his necessities might require. The deed, while disadvantageous to the grantor, the court held should not be set aside, especially where the grantor, for whom a conservator had been appointed, wished that it should remain in effect: *Looby v. Redmond*, 66 Conn. 444.

² *Wright v. Jackson*, 59 Wis. 569. Where an action was brought to cancel a note and mortgage alleged to have been procured by fraud and undue influence by reason of the maker's weakness of mind, it is proper for the jury to consider evidence of his embarrassed financial condition for the purpose of tending to show his mental condition at the time of the execution of the instruments: *Tucker v. Roach*, 139 Ind. 275.

³ *Ripley v. Babcock*, 13 Wis. 425. See *Henderson v. McGregor*, 30 Wis. 78; *Encking v. Simmons*, 28 Wis. 272; *Miller v. Craig*, 36 Ill. 109; *Speers v. Sewell*, 4 Bush, 239; *Davis v. Culver*, 13 How. Pr. 62; *Rippy v. Gant*, 4 Ired. Eq. 443; *Crowther v. Rowlandson*, 27 Cal. 376; *Osterhout v. Shoemaker*, 3 Hill. 513; *Odell v. Buck*, 21 Wend. 142; *Darby v. Hayford*, 56 Me. 246. But see *Samuel v. Marshall*, 3 Leigh, 567; *Smith v. Elliott*, 1 Pat. & H. 307. In an action brought to set aside a deed on the ground that the grantor was mentally incapable of executing a conveyance, the court gave an instruction that if the grantor did not, at the time of the execution of the deed, possess that degree of mental capacity which would enable him to understand and act with discretion in the ordinary affairs of life, the deed should be set aside. The instruction was held not to be erroneous: *Raymond v. Wathen*, 142 Ind. 367.

ability to comprehend the contract, and is unaccompanied by evidence of undue influence or imposition.¹ Each case, however, as has been remarked, must be decided by its own circumstances. In a case before the Supreme Court of the United States, Justice Field laid down this rule: "It is not necessary in order to secure the aid of equity to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that from her sickness and infirmities she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred."² But where there is no evidence of fraud committed or of undue advantage taken of the grantor's weakness, such weakness, unless it is to such a degree that it may be termed imbecility, will not invalidate the deed.³ And even in the case of a lunatic, a contract may be obligatory on him unless the party with whom he dealt knew or ought to have known of his infirmity of intellect, and took some unconscionable advantage of him.⁴ But where it appears that imposition

¹ *Miller v. Craig*, 36 Ill. 109; *Van Horn v. Keenan*, 28 Ill. 488; *Aiman v. Stout*, 42 Pa. St. 114. The presumption is that the grantor was sane and competent to execute the deed: *Buckey v. Buckey*, 18 S. E. Rep. 383; 38 W. Va. 168. See, also, *West v. Douglas*, 145 Ill. 164.

² *Allore v. Jewell*, 94 U. S. (4 Otto), 506, 510; *Harding v. Handy*, 11 Wheat. 125; *Kemson v. Ashbee*, 10 Ch. Cas. 15. The justice also remarked: "It may be stated as settled law that wherever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside": *Allore v. Jewell*, *supra*.

³ *Marmon v. Marmon*, 47 Iowa, 121; *Trimbo v. Trimbo*, 47 Minn. 389; *Argo v. Coffin*, 142 Ill. 368; 34 Am. St. Rep. 86.

⁴ *Richardson v. Strong*, 13 Ired. 106; 55 Am. Dec. 430; *Ashcroft v. De Armond*, 44 Iowa, 229; *Sims v. McLure*, 8 Rich. Eq. 286; 70 Am. Dec. 196; *Campbell v. Hill*, 22 Up. Can. C. P. 526; s. c. 23 Up. Can. C. P. 473; *Lincoln v. Buckmaster*, 32 Vt. 652; *Greenslade v. Dare*, 20 Beav. 284; *Skidmore v. Ramline*, 2 Bradf. 122; *Beavan v. M'Donnell*, 9 Ex. 309;

was practiced or the consideration is grossly inadequate, importance will be attached to slight evidence tending to establish imposition or unfair dealing.¹ In this connection it may be stated that the condition of the party's mind immediately before, at, and after the execution of the contract or conveyance may be shown as tending to establish his insanity;² but evidence is not admissible to show insanity at remote periods before or after the making of the conveyance.³

§ 70. **Nervous excitement.**—The main question in all cases of this kind is, was there a sufficient assent to the deed? An insane person not knowing what he is doing is incapable of giving such assent. Mere weakness of mind does not defeat the operation of a deed; nor, it is held, is mere nervous excitement existing in the grantor's

Campbell v. Hooper, 3 Smale & G. 153; *Dane v. Kirkwall*, 8 Car. & P. 679; *Browne v. Joddrell*, 1 Moody & M. 105; *Molton v. Camroux*, 2 Ex. 487; *Elliott v. Ince*, 7 De Gex, M. & G. 475.

¹ *Wilson v. Oldham*, 12 Mon. B. 55; *McFadden v. Vincent*, 21 Tex. 47; *Hale v. Brown*, 11 Ala. 87; *Kennedy v. Currie*, 3 Wash. 442; *Bunch v. Hurst*, 3 Desaus. Oh. 273; 5 Am. Dec. 551.

² *Peaslee v. Robbins*, 3 Met. 164; *Grant v. Thompson*, 4 Conn. 203; 10 Am. Dec. 119; *Dickinson v. Barber*, 9 Mass. 225; 6 Am. Dec. 58; *Watson v. Anderson*, 11 Ala. 43; *Negroes Jerry v. Townshend*, 9 Md. 145; *Hendrix v. Money*, 1 Bush, 306. The grantee must prove that the deed was executed in a lucid interval where the grantor had been affected with general and confirmed insanity before the execution. The deed cannot be upheld by evidence that the grantor was sane or had intermissions of the derangement at times prior to the execution of the deed and after the existence of the general derangement: *Pike v. Pike*, 104 Ala. 642. Where a grantor, suffering from general and confirmed insanity, executed a deed of all his land for no valid reason, without necessity, for half the value of the land, and without obtaining a note or bond for the unpaid purchase money so as to protect him against the recital of its payment in the deed, the transaction does not comport with the conduct of men of ordinary prudence and intelligence, and is sufficient of itself to disprove the existence of a lucid interval at the time of the execution of the deed: *Pike v. Pike*, 104 Ala. 642.

³ *Harden v. Hays*, 14 Pa. St. 91. Where a grantor was found to be mentally incompetent on the day that a deed was executed, but it was not delivered until several days after that day, the question whether he was in the same mental condition at the time of the delivery of the deed is one of fact: *Baxter v. Baxter*, 27 N. Y. Sup. 834; 76 Hun, 98.

mind at the time of the execution sufficient to invalidate it.¹

§ 71. Deed of person deaf and dumb. — A deed is not invalid from the mere fact that it was made by a person deaf and dumb from his nativity. If the grantor had sufficient capacity to execute a contract, and was aware that he was making a conveyance of his estate, it is immaterial how such knowledge was communicated to him.²

§ 72. Insane husband joining in wife's deed. — Under statutes providing that the deeds of married women shall be valid if the husband shall join therein, the husband cannot give his assent to his wife's conveyance while he is insane. Such a deed is not merely voidable, but is void to the same extent as if no assent whatever had been given by the husband. Nor can the requirement of such a statute be met by the subsequent assent or ratification by the husband, the case being essentially different from that where the deed of an insane grantee is voidable and capable of ratification by him after he becomes sane.³

§ 73. Deed, when voidable. — The deed of a person *non compos mentis* who is not under guardianship transfers a seisin and is merely voidable,⁴ and if executed during

¹ *Darby v. Hayford*, 56 Me. 246. It has frequently been held in cases involving the capacity of a testator to make a will, that a belief in spiritualism, witches, or evil spirits, or an erroneous belief on moral matters, did not prove the insanity of the testator: *Smith's Will*, 52 Wis. 543; 38 Am. Rep. 756; *Thompson v. Thompson*, 21 Barb. 107; *Turner v. Hand*, 3 Wall. Jr., 88; *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722; *Gass v. Gass*, 3 Humph. 278; *Bonard's Will*, 16 Abb. Pr., N. S., 128; *Chafin Will Case*, 32 Wis. 557; *Weir's Will*, 9 Dana, 440; *Walcot v. Alleyn*, Milw. 65; *Ditchburn v. Fearn*, 5 Jur. 201.

² *Brown v. Brown*, 3 Conn. 299; 8 Am. Dec. 187.

³ *Leagate v. Clark*, 111 Mass. 308.

⁴ *Riggan v. Green*, 80 N. C. 236; 30 Am. Rep. 77; *Breckenridge v. Ormsby*, 1 Marsh. J. J. 236; 19 Am. Dec. 71; *Cates v. Woodson*, 2 Dana, 452; *Ingraham v. Baldwin*, 5 Seld. 45; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Allis v. Billings*, 6 Met. 415; 39 Am. Dec. 744; *Freed v. Brown*, 55 Ind. 310; *Jackson v. Gumaer*, 2 Cowen, 552; *Crouse v. Hol-*

a lucid interval it cannot be successfully assailed on the ground of the anterior for subsequent insanity of the grantor.¹ The fact that the grantor made several attempts to commit suicide before executing a deed and succeeded in his attempt after its execution is not sufficient to establish his insanity so as to incapacitate him from making a deed.² Where the grantee after the disability of the grantor's infancy is removed, placed improvements with the latter's knowledge on the land conveyed, it is not essential to show that the grantor positively encouraged the improvements to estop him from disaffirming the deed.³

§ 74. Deed, when void. — But if the incompetent has been placed under guardianship, this fact is deemed conclusive on the question of his disability, and a deed made by him is void.⁴ In cases of this nature, relief will be

man, 19 Ind. 30; *Price v. Berrington*, 3 Macn. & G. 486; *Desilver's Est.* 5 Rawle, 111; 28 Am. Dec. 645; *Bensell v. Chancellor*, 5 Whart. 371; 34 Am. Dec. 561; *Beals v. See*, 10 Pa. St. 56; 49 Am. Dec. 573; *Seaver v. Phelps*, 11 Pick. 304; 22 Am. Dec. 372; *Thomas v. Hatch*, 3 Sum. 170; *Key v. Davis*, 1 Mo. 32; *Eaton v. Eaton*, 8 Vroom, 103; 18 Am. Rep. 716; *Somers v. Pumphrey*, 24 Ind. 231; *Castro v. Geil*, 110 Cal. 292; *Tucker v. Moreland*, 10 Peters, 58; *Yauger v. Skinner*, 1 McCart. 389; *Burnham v. Kidwell*, 113 Ill. 425; *Fay v. Burditt*, 81 Ind. 433; 42 Am. Rep. 142; *Pearson v. Cox*, 71 Tex. 246; 10 Am. St. Rep. 740; *Elston v. Jasper*, 45 Tex. 409; *Odom v. Riddick*, 104 N. C. 515; 17 Am. St. Rep. 686; *Riggan v. Green*, 80 N. C. 236; 30 Am. Rep. 77; *Gribben v. Maxwell*, 34 Kan. 8; 55 Am. Rep. 233; *Boyer v. Berryman*, 123 Ind. 451. But see *Farley v. Parker*, 6 Or. 105; 25 Am. Rep. 504; *Van Dusen v. Sweet*, 51 N. Y. 378, 383. This section was quoted with approval in *Castro v. Geil*, 110 Cal. 292; 52 Am. St. Rep.

¹ *Harden v. Hayes*, 14 Pa. St. 91; *Wilkinson v. Pearson*, 23 Pa. St. 117.

² *Jones v. Gorham*, 90 Ky. 622; 29 Am. St. Rep. 423.

³ *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939; *Woods v. Wilson*, 37 Pa. St. 379.

⁴ *Wait v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Mohr v. Tulip*, 40 Wis. 66; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705; *Elston v. Jasper*, 45 Tex. 409; *Van Deusen v. Sweet*, 51 N. Y. 378; *Nichol v. Thomas*, 53 Ind. 42; *Griswold v. Miller*, 15 Barb. 520; *Wadsworth v. Sherman*, 14 Barb. 169; *Leonard v. Leonard*, 14 Pick. 280; *White v. Palmer*, 4 Mass. 147; *M'Donald v. Morton*, 1 Mass. 543; *Rogers v. Walker*, 6 Pa. St. 371; 47 Am. Dec. 470; *Mohr v. Tulip*, 40 Wis. 66; *Copenrath v. Kienby*, 83 Ind. 18; *Rannells v. Gerner*, 80 Mo. 474; *Klohs v. Klohs*, 61 Pa. St. 245; *Elston v. Jasper*, 45 Tex. 409; *Imhoff v. Witmer*, 31 Pa. St. 243. But see *Hunt v. Hunt*, 2 Beas. 161.

given in equity by declaring the party claiming as grantee to be a trustee, and directing him to execute a reconveyance.¹ Where a contract for the conveyance of land was performed by the subsequent execution of a deed, it was held that if the grantor was sane when he executed the contract, the title of the vendee was good in equity, and if sane when he executed the deed, it was good in law; and though the grantor might be a monomaniac, if the contract and deed were not affected by his monomania, they would be valid.²

§ 75. Deed, by whom may be avoided.—Strangers and persons who are merely the privies in estate of the grantor have not the right of avoiding a voidable deed.³ But it may be rescinded by the grantor himself when restored to reason, or by his executor, administrator, committee, guardian, or his heirs.⁴ In a bill of equity brought to rescind a contract for land, it was alleged that one of the parties through whom the title had passed was insane when he executed his deed, and that one claiming by inheritance had commenced proceedings to have the deed canceled, it was held that as the legal title passed by the

¹ Perry on Trusts, § 189; Mansfield's Case, 12 Co. 123; Welby v. Welby, Toth. 164; Attorney General v. Parnter, 3 Bro. Ch. 441; Addison v. Mascall, 2 Vern. 678; 3 Atk. 110; Price v. Berrington, 7 Hare, 394; 3 Macn. & G. 486; Addison v. Dawson, 2 Vern. 678; Wright v. Booth, Toth. 166; Wilkinson v. Brayfield, 2 Vern. 307; Clark v. Ward, Prec. Ch. 150; Ferrers v. Ferrers, Eq. Cas. Abr. 695. See Rogers v. Blackwell, 49 Mich. 192.

² Ekin v. McCracken, 11 Phila. 534. See Turner v. Rusk, 53 Md. 65; Fecl v. Guinault, 32 La. An. 91.

³ Breckenridge v. Ormsby, 1 Marsh. J. J. 236, 248; 19 Am. Dec. 71; Kilbee v. Myrick, 12 Fla. 419; Hunt v. Weir, 4 Dana, 347; Hoyle v. Stowe, 2 Dev. & B. 320; Ingraham v. Baldwin, 9 N. Y. 45. But see Thomas v. Hatch, 3 Sum. 170. A deed will not be set aside at the suit of a judgment creditor on account of the grantor's insanity. The deed can be avoided only by the grantor or his privies: Rollet v. Heiman, 120 Ind. 511; 16 Am. St. Rep. 340.

⁴ Key v. Davis, 1 Md. 32; Judge of Probate v. Stone, 44 N. H. 593; Campbell v. Kuhn, 45 Mich. 513; 40 Am. Rep. 479; Cates v. Woodson, 2 Dana, 452; Brown v. Freed, 43 Ind. 253. Suit should be brought in the name of the lunatic by his committee: Arnold v. Townsend, 14 Phila. 216.

deed which could not be defeated at the instance of a stranger, there was no equity in the bill. A purchaser under such circumstances should show that the deed had been set aside, or at least that such a suit is pending as in all probability would result in the cancellation of the deed.¹ Where a purchaser in good faith at a sale under a statute of foreclosure brings an action against one other than the mortgagor for possession of the premises, evidence of the mortgagor's unsoundness of mind at the time of the execution of the mortgage is incompetent.²

§ 76. **Restoration of consideration.**—There is not an unanimity of opinion on the question as to the necessity of restoring the purchase money and placing the grantee in the same position that he occupied before the execution of the deed, in cases where the grantee acted without notice of the grantor's insanity and in good faith. On the one hand, it is held in such a case the grantee should receive what he has paid out before a deed made to him, acting in good faith by an insane grantor should be set aside.³ But, on the other hand, it is held that the right of avoidance exists against *bona fide* purchasers without notice, and that no previous offer of restitution is neces-

¹ Hunt v. Weir, 4 Dana, 347.

² Ingraham v. Baldwin, 12 Barb. 9; s. c. 9 N. Y. 45.

³ Rusk v. Fenton, 14 Bush, 490; 29 Am. Rep. 413; Addison v. Dawson, 2 Vern. 678. And see Davis Sewing Machine Co. v. Barnard, 43 Mich. 379; Fitzgerald v. Reel, 9 Smedes & M. 94; Scanlan v. Cobb, 85 Ill. 296; Niell v. Morley, 9 Ves. 478; Riggan v. Green, 80 N. O. 236; 30 Am. Rep. 77; Price v. Berrington, 3 Macn. & G. 486; Menkins v. Lightner, 18 Ill. 282; Gauger v. Skinner, 1 McCart. 389; Carr v. Holliday, 1 Dev. & B. Eq. 344; Eaton v. Eaton, 8 Vroom, 108; 18 Am. Rep. 716; Gribben v. Maxwell, 34 Kan. 8; 55 Am. Rep. 233; Leavitt v. Files, 38 Kan. 26; Myers v. Knabe, 51 Kan. 720; Odom v. Riddick, 104 N. C. 515; 17 Am. St. Rep. 686; Elder v. Schumacher, 18 Col. 433; Boyer v. Berryman, 123 Ind. 451; Fay v. Burdett, 81 Ind. 433; 42 Am. Rep. 142; Freed v. Brown, 55 Ind. 310; Copenrath v. Keenby, 83 Ind. 18; Burnham v. Kidwell, 113 Ill. 425; Mohr v. Tulip, 40 Wis. 66; Blodgett v. Hitt, 29 Wis. 169; Young v. Stevens, 48 N. H. 133; 2 Am. Rep. 202; 97 Am. Dec. 592; Lincoln v. Buckmaster, 32 Vt. 652; Corbit v. Smith, 7 Iowa, 60; 71 Am. Dec. 431; Behrens v. McKenzie, 23 Iowa, 333; 92 Am. Dec. 428; Abbott v. Creal, 56 Iowa, 175; Alexander v. Haskins, 68 Iowa, 73; Allen v. Berryhill, 27 Iowa, 534; 1 Am. Rep. 309.

sary.¹ The true rule would seem to be that only in cases of fraud should the deed be set aside without return of the consideration, but in cases where the deed was taken in good faith the grantee should be reimbursed.²

§ 77. **Ratification of deed.**—A grantor, who while insane, executes a deed, may ratify it on his restoration to sanity, but to render the ratification effectual, it must appear that the grantor had an intelligent conception of what he was doing, knowing that he was acting in compliance with the contract contained in the deed.³ Intention to ratify the deed may be inferred from circumstances without proof of an express ratification. Where a grantor, after restoration to reason, did not enter upon the land or give notice of an intention to avoid the deed, but received the money due on the notes given for the price, and was fully cognizant of the fact that the grantee was in possession under the deed, his ratification of the deed was inferred.⁴ But the grantor must be able to ratify the deed intelligently.⁵ A deed made by a monomaniac, if it has

¹ *Crawford v. Scovell*, 94 Pa. St. 48; 39 Am. Rep. 766; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705; *Gibson v. Soper*, 6 Gray, 279; 66 Am. Dec. 414; *Rogers v. Walker*, 6 Pa. St. 371; 47 Am. Dec. 470; *Somers v. Pumphrey*, 24 Ind. 231; *Nichol v. Thomas*, 53 Ind. 42; *Northwestern Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 535; 48 Am. Rep. 185; *Physio Medical College v. Wilkinson*, 108 Ind. 314; *Dewey v. Allgire*, 37 Neb. 6; 40 Am. St. Rep. 468; *Ricketts v. Joliff*, 62 Miss. 440; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117; *Brigham v. Fayerweather*, 144 Mass. 48; *Crawford v. Scovell*, 94 Pa. St. 48; 39 Am. Rep. 766. And see *Flanders v. Davis*, 19 N. H. 139.

² See *Eaton v. Eaton*, 8 Vroom, 108; 18 Am. Rep. 716.

³ *Bond v. Bond*, 7 Allen, 1. And see *Tucker v. Moreland*, 10 Peters, 64; *Eaton v. Eaton*, 8 Vroom, 108; 18 Am. Rep. 716.

⁴ *Arnold v. Richmond Iron Works*, 1 Gray, 434. It must also appear that it was the grantor's intention to ratify the deed: *Eaton v. Eaton*, 37 N. J. L. 108; 18 Am. Rep. 716.

⁵ *Valpey v. Rea*, 130 Mass. 384. The grantor of lands was, at the time of the conveyance, seventy-eight years of age, afflicted with senile cerebral atrophy, and of so weak mind and memory that he often did not know his own children with whom he lived, and would frequently become lost around his own house and premises. It was held that the grantor was incapable of giving intelligent consent, and that his deed would be annulled and vacated, although the consideration was an equitable claim held against him by the grantee: *Cole v. Cole*, 21 Neb. 84. Where a grantor executed a deed to one child for a consideration, *rea*

no connection with his morbid subject, will be upheld.¹

sonable and natural, and the grantor was neither wholly incompetent, nor unaided, fully competent, to understand the nature of the transaction, but understood her relation to her children, knew of what her property consisted, suggested giving the deed, intended to convey her farm to the grantee as she did, and have her support secured upon it, but by mistake obtained only a "life lease" back, and would not have conveyed the farm, and taken a life lease back, had she fully comprehended what she was doing, told what disposition she was going to make of her other property, and looked at the life lease as all she was to have for her support—it was held, in a suit by her administrator, that incapacity was not established, and the deed would not be set aside: *Stewart v. Flint*, 59 Vt. 144. The rule as to the measure of mental capacity of a grantor of a deed is that she must possess sufficient to enable her to understand in a reasonable manner the nature and effect of the business she is doing: *Stewart v. Flint*, 59 Vt. 144. If the grantor's mental incapacity is not permanent and continuous, but exists only "by spells," the burden of proof, where the act is reasonable and natural, is on the party assailing the act to show the incapacity at the time it was done: *Stewart v. Flint*, 59 Vt. 144. If a deed is delivered several days after its execution, and the grantor is found to be mentally incompetent on the day of its execution, it is a question of fact whether he was in the same mental condition at the time of the delivery of the deed: *Baxter v. Baxter*, 27 N. Y. Sup. 834; 76 Hun, 98. The presumption is that the grantor in a deed was sane and competent to execute it at the time of its execution: *Buckey v. Buckey*, 18 S. E. Rep. 383; 38 W. Va. 168. See, also, *West v. Douglas*, 145 Ill. 14. Where the evidence shows an entire absence of confidential relations between the parties, and an entire absence of any influence exerted by the grantee on the grantor in regard to the transaction, the ordinary presumption attaches as to the validity of the deed, and the disposing capacity of the grantor; and, on proof of the due and proper execution of the instrument, the burden is on the attacking party to prove his case: *Jones v. Jones*, 33 N. E. Rep. 479; 137 N. Y. 610. A deed was executed by a man eighty-six years of age, while he was suffering both physically and mentally from the decay and decrepitude usually incident to old age. Several months later he was declared insane from senile dementia. The evidence was conflicting as to his mental capacity when he signed the deed. It was held, that a finding that he was capable of executing the deed would not be disturbed on appeal: *West v. Douglas*, 145 Ill. 111. Where testimony as to the competency of the grantor is conflicting, the acquiescence of all the parties in interest in the act of the grantor for fourteen years, and the fact that the grantee lived with the father and mother during his whole life, and was their reliance for support and maintenance in the cultivation of the farm, and cared for the mother and invalid brother after the death of the father, indicate a purpose in the mind of the grantor in making the conveyance, and constitute reasons why it should not be disturbed: *Adair v. Cook* (Ky. Oct. 13, 1887), 5 S. W. Rep. 412.

¹ *Eken v. McCracken*, 32 Leg. Intel. (Pa.) 405; *Burgess v. Pollock*,

§ 78. Effect of grantor's subsequent insanity on contract of purchase.—Where equities exist in favor of third persons, courts of equity are disposed to decree the specific performance of agreements to convey entered into by a party while sane, but who afterward becomes insane.¹ If a contract for the sale of land is made by one who dies before the execution of the deed, and who leaves an insane child as his only heir at law, a court of equity has power to enforce a specific performance of the contract by directing the committee of the lunatic to execute the necessary deed.² Where the vendor has been found to have been insane at a time prior to the execution of the contract, the vendee will not be compelled to accept the title.³

§ 79. Disability from intoxication.—A deed executed by a person in such a state of intoxication that he is incapable of giving an intelligent consent to a contract may be avoided by him.⁴ Persons in this condition are *non compos mentis* by their own act,⁵ and the law not only permits them to plead their intoxication as a defense to

53 Iowa, 273; 36 Am. Rep. 218. See, also, *Jenkins v. Morris*, 14 L. R. 14 Ch. D. 674. The deed of an insane person after the appointment of a guardian is either void (*Rannells v. Garner*, 80 Mo. 474; *Wait v. Maxwell*, 5 Pick, 217; 16 Am. Dec. 391; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705); or presumptively void. *Jackson v. Burchin*, 14 Johns. 124; *Van Deusen v. Sweet*, 51 N. Y. 378. It has been held that a restoration of the consideration is not necessary to secure a cancellation of the deed; *Brigham v. Fayerweather*, 144 Mass. 48; *Crawford v. Scovell*, 94 Pa. St. 48; 39 Am. Rep. 766; *Rogers v. Walker*, 6 Pa. St. 371; 47 Am. Dec. 470.

¹ *Lawrie v. Lees*, 14 L. R. 14 Ch. D. 249; *Owen v. Davies*, 1 Ves. Sr. 82; *Pegge v. Skynner*, 4 Cox Eq. 23; *In re Doolan*, 3 Dru. & War. 442; *Swartwout v. Burr*, 1 Barb. 495. And see *Yauger v. Skinner*, 1 McCart. 349; *Hall v. Warren*, 9 Ves. 605; *In re Cuming* 14 L. R. 5 Ch. 72.

² *Swartwout v. Burr*, 1 Barb. 495.

³ *Francis v. St. Germain*, 6 Grant U. C. 636. See *Yanger v. Skinner*, 1 McCart. 389.

⁴ *Donelson v. Posey*, 13 Ala. 752; *Reinicker v. Smith*, 2 Har. & J. 421; *Dulany v. Green*, 4 Har. (Del.) 285; *Warnock v. Campbell*, 25 N. J. Eq. 485.

⁵ *Co. Litt.* 247 a, 447 a; *Beverly's Case*, 4 Co. 124; *Hendrick v. Hopkins*, Cary, 93.

actions founded upon such instruments, but also authorizes a court of equity upon a seasonable application of the parties, or their legal representatives, to set the conveyances aside.¹ By one eminent judge it is said: "As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law, it would invalidate a deed obtained from him while in that condition."²

§ 80. **Degree of intoxication.**—As the reason for setting aside such conveyances is that the grantor is incapable of giving a valid consent, the intoxication should be such as to deprive him, for the time being, of his understanding, or at least to seriously impair his reasoning powers;³ and when it is of this character, it is immaterial whether or not there was connivance on the part of the grantee, at the intoxication.⁴ If, however, there is connivance by the grantee, the conveyance will be set aside, though the grantor is not wholly deprived of his reason, if it appear that any unfair advantage was taken of his condition. In such a case, the transaction would contain the element of fraud, and the court would not

¹ *Pitt v. Smith*, 3 Camp. 34; *Butler v. Mulvihill*, 1 Bligh, 160. In *Pitt v. Smith*, Lord Ellenborough said: "Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise."

² Sir W. Grant in *Cooke v. Clayworth*, 18 Ves. Jr. 16. See *Jenners v. Howard*, 6 Blackf. 220; *Gore v. Gibson*, 13 Mees. & W. 623.

³ *Johnson v. Phifer*, 6 Neb. 401. See, also, *Freeman v. Staats*, 8 N. J. Eq. 814; *Woods v. Pindall*, Wright, 507; *Pickett v. Sutter*, 5 Cal. 412; *Barrett v. Buxton*, 2 Aiken, 167; 16 Am. Dec. 691; *Wade v. Colvert*, 2 Mill Const. 27; 12 Am. Dec. 652; *Taylor v. Patrick*, 1 Bibb, 168; *Bursinger v. Bank*, 67 Wis. 75; 58 Am. Rep. 848; *Shackelton v. Sebore*, 86 Ill. 616; *Reinsch v. Rogge*, 37 Ind. 207; *Caulkins v. Fry*, 35 Conn. 170. See *Burroughs v. Richman*, 13 N. J. L. 233; 23 Am. Dec. 717; *Foot v. Tewksbury*, 2 Vt. 97; *Lee v. Ware*, 1 Hill (S. O.), 313; *White v. Cox*, 3 Hayw. (Tenn.) 82; *Broadwater v. Dorne*, 10 Mo. 277; *Birdsong v. Birdsong*, 2 Head, 289; *Drummond v. Hopper*, 4 Har. (Del.) 327.

⁴ *Drummond v. Hopper*, 4 Har. (Del.) 327; *Gore v. Gibson*, 13 Mees. & W. 623; *Barrett v. Buxton*, 2 Aiken, 167; 16 Am. Dec. 691; *Foot v. Tewksbury*, 2 Vt. 97; *Burroughs v. Richman*, 13 N. J. L. 233; 23 Am. Dec. 717; *Wigglesworth v. Steers*, 1 Hen. & M. 70; 3 Am. Dec. 602.

suffer a party to retain any advantage obtained in such a mode, and would refuse its assistance to carry the contract or conveyance into effect.¹ A deed will not be binding upon one whose mind has become so weakened and impaired by long continued previous intoxication as to incapacitate him from giving that consent essential to the validity of all contracts, even though at the time of the execution of the conveyance he is not intoxicated.² Thus, in one case, it was decided that although a person is not actually intoxicated at the time, yet if by intoxication he has been reduced to such extreme debility as to be incapable of rising or sitting up in bed unless supported, or of holding a pen, or making a mark unless the pen and hand are held for him, he is as powerless to execute a conveyance of his property as if in a state of actual intoxication.³

¹ Say *v.* Barwick, 1 Ves. & B. 195; Cooke *v.* Clayworth, 18 Ves. 12; Pett *v.* Smith, 3 Camp. 33; Johnson *v.* Meddlecott, 3 P. Wms. 131; Jenness *v.* Howard, 6 Blackf. 240; Cory *v.* Cory, 1 Ves. 19; Crane *v.* Conklin, Saxt. Ch. 346; 22 Am. Dec. 519; Hutchinson *v.* Tindall, 2 Green Ch. 128; Shaw *v.* Thackray, 1 Smale & G. 537; Nagle *v.* Baylor, 2 Dr. & W. 64; Calloway *v.* Witherspoon, 5 Ired. Eq. 128; Phillips *v.* Moore, 11 Miss. 600; Cooley *v.* Rankin, 11 Mo. 642; Cragg *v.* Holme, 18 Ves. 14, n.; Shievs *v.* Higgons, 1 Madd. Ch. Pr. 399.

² White *v.* Cox, 3 Hayw. (Tenn.) 79; Birdsong *v.* Birdsong, 2 Head, 289; Mansfield *v.* Watson, 2 Iowa, 111.

³ Wilson *v.* Bigger, 7 Watts & S. 111. The fact that a father regarded a son obtaining a deed of gift from him with the most favor, and was disposed to give him the largest portion of his estate, it is held, is no ground of objection to the transaction, nor is the fact that the father was at the time in some degree intoxicated, if the son used no contrivance or management to draw him into drink, and took no unfair advantage of his state of intoxication to obtain the deeds: Belcher *v.* Belcher, 10 Yerg. 121. See Morris *v.* Nixon, 7 Humph. 579; Wiley *v.* Ewalt, 66 Ill. 26. The rule is well settled that a contract may be avoided where the person entering into it was so intoxicated as to be incapable of understanding what he was doing. See for various cases on this subject: Holland *v.* Barnes, 53 Ala. 83; 25 Am. Rep. 595; Broadwater *v.* Darne, 10 Mo. 277; Prentice *v.* Achorn, 2 Paige, 30; Freeman *v.* Staats, 8 N. J. Eq. 814; Burroughs *v.* Richman, 1 Green (N. J.), 233; 23 Am. Dec. 717; Duncan *v.* McCullough, 4 S. & R. 484; Foss *v.* Hildreth, 10 Allen, 76; Mansfield *v.* Watson, 2 Iowa, 111; Donnelson *v.* Posey, 13 Ala. 752; Lazell *v.* Pinnick, 1 Tyler, 247; 4 Am. Dec. 722; Pickett *v.* Sutter, 5 Cal. 412; Reinskopf *v.* Ragge, 37 Ind. 207; Clark *v.* Caldwell, 6 Watts, 139;

§ 81. **Deeds made under duress.**—A person who has executed a deed or other contract under duress may plead this as a defense to an action founded upon the instrument, or he may avail himself of it as a ground for setting it aside.¹ A deed executed under duress is voidable merely, and not void.² Therefore, after the removal of the duress, the transaction may be ratified by the acknowledgment of the deed.³ As the privilege of avoiding a contract or conveyance for duress is personal, creditors and strangers to the contract cannot take advantage of it, if the party himself makes no objection.⁴ Hence, a deed obtained under duress, being voidable between the immediate parties only, it follows that when an innocent pur-

Walker v. Davis, 1 Gray, 506; Seymour v. Delancy, 3 Cow. 445; 15 Am. Dec. 270; Newell v. Fisher, 11 Smedes & M. 431; 49 Am. Dec. 66; Joest v. Williams, 42 Ind. 565; 13 Am. Rep. 377; Bates v. Ball, 72 Ill. 108; Eaton v. Perry, 29 Mo. 96; Allen v. Berryhill, 27 Iowa, 534; 1 Am. Rep. 309; Musselman v. Cravens, 47 Ind. 1. But the intoxication must be of such a degree as to overcome the faculties: Pickett v. Sutter, 5 Cal. 412; Bates v. Ball, 72 Ill. 108; Johns v. Fretchey, 39 Md. 258; Birdsong v. Birdsong, 2 Head (Tenn.), 289; Schramm v. O'Connor, 98 Ill. 541; Cavender v. Waddingham, 5 Mo. App. 457. But where it does not amount to this degree, it is insufficient to avoid a contract: Caulkins v. Fry, 35 Conn. 170; Henry v. Ritenour, 31 Ind. 136; Miller v. Finley, 26 Mich. 248. It may be shown that a party was intoxicated several hours after a contract had been made as tending to throw light on his condition at the time the contract was made: Phelan v. Gardner, 43 Cal. 306. The person alleging drunkenness has the burden of proof: Black v. Ellis, 3 Hill (S. C.), 68. But where a person has, under a statute, been adjudged to be a habitual drunkard: See Imhoff v. Witmer, 31 Pa. St. 243; Klohs v. Klohs, 61 Pa. St. 245; Clark v. Caldwell, 6 Watts, 139; Leckey v. Cunningham, 56 Pa. St. 370.

¹ Hackett v. King, 6 Allen 58; Kelsey v. Haply, 16 Pet. Adm. 269; Foss v. Hildreth, 10 Allen, 76; Knight's Case, 3 Leon, 239.

² Davis v. Fox, 59 Mo. 125; Brown v. Peck, 2 Wis. 261; Deputy v. Stapleford, 19 Cal. 302; Baker v. Morton, 12 Wall. 150; Cook v. Moore, 39 Tex. 255; Bogle v. Hammons, 2 Heisk. 136; Fairbanks v. Snow, 145 Mass. 153; 1 Am. St. Rep. 446; Eberstein v. Willets, 134 Ill. 101. Hence, under the plea of *non est factum*, evidence of duress is not admissible: Bacon's Abridgment, tit. Duress, D; Worcester v. Eaton, 13 Mass. 371; 7 Am. Dec. 155.

³ Bissett v. Bissett, 1 Har. & McH. 211.

⁴ Lewis v. Bannister, 16 Gray, 500; McClintock v. Cummins, 3 McLean, 158.

chaser acquires the land without notice of the duress, that, as to him, the deed cannot be set aside for duress.¹ Duress, to be available as a ground for setting aside a conveyance, must be of such a nature as to excite an apprehension or fear of great bodily harm or illegal punishment, and the violence or threats should be of such a degree as to cause a person of ordinary firmness and courage to yield.²

§ 82. **Threat of legal proceedings.**—If a person threatens to do an act permitted by law, as to bring suit and obtain an attachment, when a probable ground of action exists, or if the violence used be simply legal constraint, there is no duress sufficient to set aside a conveyance.³ But if the proceedings at law are used as a pretext, or threats are made to do acts not permitted by law, and a conveyance is obtained by such means, it may be set aside. If a threat is made to arrest a person in a proceeding in which the law does not authorize an arrest, and the threat is of such a nature that the will of a person of ordinary firmness would be overcome, a contract or conveyance obtained thereby may be set aside on the ground of duress.⁴ Equity will set aside a conveyance obtained by duress caused by the abuse of legal process,

¹ *Deputy v. Stapleford*, 19 Cal. 302.

² *Barrett v. French*, 1 Conn. 354; 6 Am. Dec. 241; *United States v. Huckabee*, 16 Wall. 432; *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556; *Burr v. Burton*, 18 Ark. 214; *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445; *State v. Sluder*, 70 N. C. 55; *Bosley v. Schanner*, 26 Ark. 280; *Durr v. Howard*, 6 Ark. 561; *Beckwith v. Frisbie*, 32 Vt. 559; *Maxwell v. Griswold*, 10 How. 242. The existence of the duress must be clearly proven: *Holt v. Agnew*, 67 Ala. 360; *Davis v. Fox*, 59 Mo. 125; *Lefebvre v. Dutruit*, 51 Wis. 326; 37 Am. Rep. 833; *Insurance Co. v. Nelson*, 103 U. S. 544; *Hamilton v. Smith*, 57 Iowa, 15; 42 Am. Rep. 39; *Feller v. Green*, 26 Mich. 70; *Snyder v. Snyder*, 95 Mich. 51; *Post v. First Nat. Bank*, 138 Ill. 559; *Brower v. Callender*, 105 Ill. 88.

³ *Harris v. Tyson*, 24 Pa. St. 347; 64 Am. Dec. 661; *Crowell v. Gleason*, 10 Me. 325; *Wilcox v. Howland*, 23 Pick. 167; *Davis v. Luster*, 64 Mo. 43; *Gresham v. Landens*, Ga. Dec. pt. 2, 149; *Eddy v. Herrin*, 17 Me. 338; 35 Am. Dec. 261; *Shephard v. Watrous*, 3 Caines, 166.

⁴ *Foss v. Hilbreth*, 10 Allen, 76; *Whitefield v. Longfellow*, 13 Me. 146; *Wade v. Simeon*, 2 Com. B. 548.

though the process may not have been unlawful in its inception.¹ An arrest by itself is not sufficient to constitute duress. It must either have been illegal from the beginning, or must have become so afterward by an abuse of the process.² Lawful imprisonment cannot amount to duress, and if a person is arrested and imprisoned and voluntarily executes a deed for his deliverance, he cannot set it aside for duress of imprisonment, if the plaintiff supposed he had a right of action against him, but in fact had none.³

§ 83. **Grantor's will-power.**—As the reason for allowing duress to avoid a deed is that consent, one of the essential elements of a contract, is wanting, consideration must be paid to the party's age, sex, disposition, state of health, and such other circumstances as may tend to show the influence on his will.⁴

§ 84. **Deeds made under undue influence.**—Deeds made under undue influence, like those obtained by

¹ *Hackett v. King*, 6 Allen, 58; *Osborn v. Robbins*, 36 N. Y. 335; *Breck v. Blanchard*, 22 N. H. 303; 9 Viner's Abridgment, 317, tit. Duress, B, pl. 1; 2 Bacon's Abridgment, tit. Duress, A.

² *Watkins v. Baird*, 6 Mass. 511; 4 Am. Dec. 170; *Richardson v. Duncan*, 3 N. H. 508; *Stouffer v. Latshaw*, 2 Watts, 167; 27 Am. Dec. 297; *Richards v. Vanderpool*, 1 Daly, 71; *Meek v. Atkinson*, 1 Bail. 84; 19 Am. Dec. 653; *Shepard v. Watrous*, 3 Caines, 163. Duress may be caused by an arrest without cause for an improper purpose, or by an arrest, though made for just cause, yet without lawful authority, or by an arrest for improper purposes, though there be just cause and lawful authority: *Strong v. Grannis*, 26 Barb. 122; *Watkins v. Baird*, 6 Mass. 511; 4 Am. Dec. 170; *Richardson v. Duncan*, 3 N. H. 508; *Thompson v. Lockwood*, 15 Johns. 256. If a conveyance or contract is procured by means of duress, caused by an arrest by a person pretending to have a warrant when he has not, it may be set aside for duress. Duress may be caused, it is said, by the mere fear of imprisonment: *Fashey v. Ferguson*, 5 Hill, 154; *Whitfield v. Longfellow*, 13 Me. 146; *Eddy v. Herrin*, 17 Me. 338; 35 Am. Dec. 261. If a contract is made under the influence of an arrest procured by perjury, although it is lawful and regular in form, it will be considered as made under duress: *Strong v. Grannis*, 26 Barb. 122. See *Cummings v. Iver*, 11 Q. B. 122.

³ *Mascolo v. Montesanto*, 61 Conn. 50; 29 Am. St. Rep. 170.

⁴ *Bane v. Detrick*, 52 Ill. 19.

duress, are voidable. Influence exerted over a grantor to such a degree as to deprive him of the exercise of his will, is in equity considered a fraud, and a conveyance obtained thereby will be set aside.¹ The burden of proving undue influence is upon the person alleging it;² and, as each case must for the most part be decided by its own peculiar circumstances, the relations between the parties should be taken into consideration in determining whether the grantor was acting under undue influence. Less evidence is necessary to establish the use of undue influence to obtain the execution of a deed when relations of trust and confidence, as parent and child, guardian and ward, trustee and beneficiary, attorney and client, physician and patient, nurse and invalid, exist, than might be required in other cases.³ Where the grantor is of feeble mind, but acts with the knowledge of friends competent to advise him in his business affairs, and against their objections, his deed will not be set aside for improper influence, unless it assumes the character of fraud.⁴ To bring it under the denomination of undue influence, the transaction must be tainted with fraud, or some unlawful coercion must be employed. "Men who live in habits of intimacy and friendship, influence one another more or less. Fathers exercise over sons, and sons over fathers, power which govern their actions more or less, which we recognize under the name of influence. If it be a just exercise of power, a discreet and proper influence directed to accomplish commendable and lawful ends, it is an in-

¹ *Howe v. Howe*, 99 Mass. 88; *Anthony v. Hutchins*, 10 R. I. 165; *Bowles v. Wathan*, 54 Mo. 261; *Turner v. Turner*, 44 Mo. 535; *Taylor v. Taylor*, 8 How. 183; *Allore v. Jewell*, 94 U. S. (4 Otto) 506; *Mead v. Coombs*, 26 N. J. Eq. 173; *Yard v. Yard*, 27 N. J. Eq. 114; *Fuller v. Fuller*, 40 Ala. 301; *Amis v. Satterfield*, 5 Ired. Eq. 173.

² *Howe v. Howe*, 99 Mass. 88.

³ *Peebles v. Horton*, 64 N. C. 374; *Bayliss v. Williams*, 6 Cold. 440; *Futrill v. Futrill*, 5 Jones Eq. 61; *Case v. Case*, 26 Mich. 484. But see *Crowe v. Peters*, 63 Mo. 429; *Jenkins v. Pye*, 12 Peters, 241; *Millican v. Millican*, 24 Tex. 426.

⁴ *Guest v. Beeson*, 2 Houst. 247; *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 431; *Hollocher v. Hollocher*, 62 Mo. 267.

fluence to which the law will take no exception, but rather encourages and upholds.”¹

§ 85. **Disability of infancy.**—Another disability on the power of parties to execute valid and effectual conveyances is that of infancy. By an infant is understood one who has not arrived at the age fixed by law as the time of majority. At common law this age was established at twenty-one years, and no distinction was made on account of sex. A woman was an infant until she had reached the age of twenty-one years.² But, generally, by statute, a shorter time is fixed for the continuance of this disability for females than for males. At common law, a person is considered as being twenty-one years of age the first instant of the last day of the twenty-first year immediately preceding the anniversary of his birth.³ In California, it is declared that the period “must be calculated from the first minute of the day on which persons are

¹ *Davis v. Culver*, 13 How. Pr. 62, 67; *Suttles v. Hay*, 6 Ired. Eq. 124; *Miller v. Miller*, 3 Serg. & R. 267; 8 Am. Dec. 651. See *Allore v. Jewell*, 94 U. S. 506. A finding that the deed of plaintiff's grantor was obtained by fraud and undue influence is justified where it is shown the maker was a feeble and childish old man; that, while sick and delirious, he conveyed the land to a young and fascinating woman, who exercised complete control over him, for no other consideration than that she should continue to live with him as his wife, and that she thereafter abandoned him: *Staley v. Housel*, 35 Neb. 160.

² Co. Litt. 171.

³ See 1 Sharswood; Blackst. Com. 463; Comyn's Dig. *Enfant A.* At law an infant is not estopped by a declaration at the time that he executes the deed that he is of age: *Conrad v. Lane*, 23 Minn. 389; 37 Am. Rep. 412; *Keen v. Coleman*, 39 Pa. St. 299; 80 Am. Dec. 524; *Carpenter v. Carpenter*, 45 Ind. 142; *Buchanan v. Hubbard*, 96 Ind. 1; *Merriam v. Cunningham*, 11 Oush. 40; *Studwell v. Shapter*, 54 N. Y. 249; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676; *Price v. Jennings*, 62 Ind. 111. But in equity he may be estopped by his own fraud in representing that he had attained his majority: *Bradshaw v. Van Winkle*, 133 Ind. 334; *Davidson v. Young*, 38 Ill. 145; *Brantley v. Wolf*, 60 Miss. 420; *Ferguson v. Bobo*, 54 Miss. 121; *Thormaehlen v. Kaepfel*, 86 Wis. 378; *Kilgore v. Jordan*, 17 Tex. 341; *Schmitheimer v. Eiseman*, 7 Bush, 298. But he is not estopped by a failure to inform the purchaser if he has not misrepresented his age: *Brantley v. Wolf*, 60 Miss. 420.

born to the same minute of the corresponding day completing the period of minority.”¹

§ 86. **Deed of minor voidable only.**—The deed of a minor, it is now settled beyond question, is not void, but merely voidable. “The rule seems well established by decided cases that the deed of a minor conveying his land for a valuable consideration is voidable and not void; that the right to avoid it on coming of age is a personal privilege to the minor and his heirs; and that it cannot be avoided by an attachment made by a creditor after the minor comes of age.”² The rule is naturally the same in the case of a lease,³ or of a mortgage.⁴ The defense of

¹ Civ. Code Cal. § 26.

² *Kendall v. Lawrence*, 22 Pick. 540, 543. “The deed of real estate by an infant is voidable and not void”: *Jenkins v. Jenkins*, 12 Iowa, 195, 198; *Breckenridge v. Ormsby*, 1 Marsh J. J. 245; 19 Am. Dec. 71; *Cook v. Toumbs*, 36 Miss. 685; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; *Slaughter v. Cunningham*, 24 Ala. 260; 60 Am. Dec. 463; *Zouch v. Parsons*, 3 Burr. 1794, 1805; *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Boston Bank v. Chamberlin*, 15 Mass. 211; *Tucker v. Moreland*, 10 Peters, 58; *Phillips v. Green*, 3 Marsh. A. K. 7; 13 Am. Dec. 124; *Roof v. Stafford*, 7 Cowen, 180; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Wellborn v. Rogers*, 24 Ga. 558; *Ferguson v. Bell*, 17 Mo. 347; *Moore v. Abernathy*, 7 Blackf. 442; *Cummings v. Powell*, 8 Tex. 89; *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25; *Kendrick v. Neisz*, 17 Col. 506; *Vallandigham v. Johnson*, 85 Ky. 288; *Hoffert v. Miller*, 86 Ky. 572; *Amey v. Cockey*, 73 Md. 297; *Craig v. Van Bebber*, 100 Mo. 584; 18 Am. St. Rep. 569; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; *Logan v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 939; *Ihley v. Padgett*, 27 S. C. 300; *Askey v. Williams*, 74 Tex. 294; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381.

³ *Wood on Landlord and Tenant*, § 101; *Slator v. Brady*, 14 I. R. C. L. 61; *Dixon v. Merritt*, 21 Minn. 196; *Scranton v. Stewart*, 52 Ind. 69; *Illinois etc. Co. v. Bonner*, 75 Ill. 315; *Griffith v. Schwendeman*, 27 Mo. 412; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429.

⁴ *State v. Plaisted*, 43 N. H. 413; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Palmer v. Miller*, 25 Barb. 399; 1 Jones on Mortgages, § 104. See, also, *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. Ch. 544; *Grace v. Whitehead*, 7 Grant (U. S.) Ch. 591; *Peers v. McLaughlin*, 88 Cal. 294; 26 Pac. Rep. 119; 22 Am. St. Rep. 306; *Featherston v. McDonell*, 15 Up. Can. C. P. 162; *Terry v. McClintock*, 41 Mich. 492; 2 N. W. Rep. 787; *Askey v. Williams*, 74 Tex. 294; 11 S. W. Rep. 1101; *Mansfield v. Gordon*, 144 Mass. 168; 10 N. E. Rep. 773; *Callis v. Day*, 38 Wis. 643; *Allen v. Poole*, 54 Miss. 323; *Robbins v. Eaton*, 10 N. H. 561; *Hubbard v.*

infancy is a privilege personal to the infant, and strangers cannot urge it as a ground for setting aside his acts.¹

§ 87. **Right of disaffirmance.**—An infant may disaffirm his deed after he becomes of age, but he is not permitted to do it during the existence of his disability.² “In case of a deed of land by an infant, it seems to be settled that the conveyance cannot be avoided until the infant becomes of age.”³ Neither the infant nor his guardian, during the continuance of the infancy, has power to declare whether a voidable contract of the infant shall be affirmed or avoided. The right to do so rests solely with the infant. It is for him alone to determine what course he will pursue when he arrives at full age.⁴ It was intim-

Cummins, 1 Me. 11; Loomer v. Wheelwright, 3 Sandf. Ch. 135; Young v. McKee, 13 Mich. 552; Keegan v. Cox, 116 Mass. 289; Baldwin v. Rosier, 48 Fed. Rep. 810; Walsh v. Young, 110 Mass. 396; Henry v. Root, 33 N. Y. 526.

¹ Brown v. Caldwell, 10 Serg. & R. 114; 13 Am. Dec. 660; Hartness v. Thompson, 5 Johns. 160; Van Bramer v. Cooper, 2 Johns. 279; Oliver v. Houdlet, 13 Mass. 237; 7 Am. Dec. 134; Worcester v. Eaton, 13 Mass. 371; 7 Am. Dec. 155; Nightingale v. Withington, 15 Mass. 272; 8 Am. Dec. 101. It is held in Tennessee that the deed of a minor, made without consideration or for one merely nominal, is absolutely void, and transfers no title to the grantee: Robinson v. Coulter, 90 Tenn. 705; 25 Am. St. Rep. 708; Swafford v. Ferguson, 3 Lea, 292; 31 Am. Rep. 639; Scobey v. Waters, 10 Lea, 557.

² Hastings v. Dollarhide, 24 Cal. 195; Bool v. Mix, 17 Wend. 119; 31 Am. Dec. 285; McCormic v. Leggett, 8 Jones (N. C.), 425; Kilgore v. Jordan, 17 Tex. 341; Cummings v. Powell, 8 Tex. 80; Sims v. Everhardt, 102 U. S. 300; Armitage v. Widoe, 36 Mich. 124; Chandler v. Simmons, 97 Mass. 508; 93 Am. Dec. 117; Shipman v. Horton, 17 Conn. 481; McCarthy v. Nicrosi, 72 Ala. 332; 47 Am. Rep. 418; Welch v. Bunce, 83 Ind. 382; Chapman v. Chapman, 13 Ind. 396; Singer Mfg. Co. v. Lamb, 81 Mo. 221. But see to contrary, Harrod v. Myers, 21 Ark. 592; 76 Am. Dec. 409. In California this is changed by the Code: Civ. Code, § 35.

³ Williams, C. J., in Shipman v. Horton, 17 Conn. 482.

⁴ Dunton v. Brown, 31 Mich. 182. He must prove his infancy, and that there was no consideration, if seeking to set aside the deed: Wade v. Love, 69 Tex. 522. The fact that the grantee has conveyed the land to an innocent purchaser for value will not prevent the infant from disaffirming his deed within a reasonable time: Searcy v. Hunter, 81 Tex. 644; 26 Am. St. Rep. 837. The right of disaffirmance is a personal privilege and a creditor cannot exercise it: Baldwin v. Rosier, 1 McCrary,

ated in one case that possibly a notice of disaffirmance given by an infant before he became of age would be operative.¹ But the court was not called upon to decide this particular point, and it is believed no case clearly announces this rule.² But if the infant dies before attaining his majority all voidable contracts made by him may be disaffirmed by his heirs or legal representatives.³

§ 88. Whether affirmance may be presumed from acquiescence.—Does it require some positive act on the part of the infant after attaining majority to disaffirm a contract or conveyance made during infancy, or may his acquiescence be presumed from a neglect to exercise his right within a reasonable time after coming of age? It is said by an eminent writer: "His confirmation of the

384. See, also, to same effect, *Kingman v. Perkins*, 105 Mass. 111; *Kendall v. Lawrence*, 22 Pick. 540; *Harkness v. Thompson*, 5 Johns. 160; *McCarty v. Murray*, 3 Gray, 578; *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Sharp v. Robertson*, 76 Ala. 343; *Harris v. Musgrove*, 59 Tex. 401; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Dunton v. Brown*, 31 Mich. 182; *Bozeman v. Browning*, 31 Ark. 364; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38.

¹ *Railway Co. v. M'Michael*, 5 Eq. 124.

² For various cases in which the principle stated in the text has been applied to contracts of infants, see *Pitcher v. Laycock*, 7 Ind. 398; *Hoyle v. Stowe*, 2 Dev. & B. 320; *Slator v. Trimble*, 14 I. R. C. L. 342; *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441; *McGan v. Marshall*, 7 Humph. 121; *Jackson v. Carpenter*, 11 Johns. 131; *Cresinger v. Welch*, 15 Ohio, 156; 45 Am. Dec. 565.

³ *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630; *Bozeman v. Browning*, 31 Ark. 364; *Veal v. Forbson*, 57 Tex. 482; *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Sharp v. Robertson*, 76 Ala. 343; *Harvey v. Briggs*, 68 Miss. 60; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Parsons v. Hill*, 8 Mo. 135. The objection of infancy to a marriage contract can only be made by the parties themselves: *Jones v. Butler*, 30 Barb. 641. See, also, upon the general proposition, *Nelson v. Eaton*, 1 Redf. 498; *Abbott v. Parson*, 3 Burr. 1805; *Tillinghast v. Holbrook*, 7 R. I. 230; *Vaughan v. Parr*, 20 Ark. 600; *Jefford v. Ringgold*, 6 Ala. 544. The guardian having no title to the property, but being merely an agent, cannot disaffirm for the infant: *Lombard v. Morse*, 155 Mass. 136. But if after the grantor arrives at majority the guardian continues to act by reason of the existence of any disability for which a guardian might be appointed for an adult, he may disaffirm a deed made during the ward's minority: *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117.

act or deed of his infancy may be justly inferred against him after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his *tacit assent* under circumstances not to excuse his silence.”¹ In Vermont, it was said by Chief Justice Prentiss: “A deed executed and delivered by an infant conveying land, remains good and valid until it is avoided by him; and as he alone has the power of avoiding the deed and rescinding the contract, he is bound in reason and justice after he comes of age, and is competent to exercise a discretion upon the subject, to make his election, and give notice of his intention. He ought not to be allowed to leave the grantee, upon whom the contract is binding, in a state of suspense and uncertainty, and unless he makes known his determination in a reasonable time, it is just that the contract should become absolute against him. At any rate, silence on his part while the grantee or any one under him is claiming, holding, and occupying under the contract, is an acquiescence from which a confirmation of the contract may be inferred.”²

§ 89. *Same subject.*—This rule also prevails in Connecticut. “It is unjust that the infant after his arrival

¹ 2 Kent's Com. 239; 12th ed., 295.

² *Bigelow v. Kinney*, 3 Vt. 353, 359; 21 Am. Dec. 589. This was affirmed, also, in *Richardson v. Boright*, 9 Vt. 368, 371, where Redfield, J., said: “In the case of every act of an infant which is merely voidable, he must disaffirm it on coming of full age, or he will be bound by it, and this must be done in a reasonable time.” In *Holmes v. Blogg*, 8 Taunt. 35, 39, Dallas, J., said: “I agree that in every instance of a contract, voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and if the case before the court were that simple case, I should be disposed to hold that as the infant had not given express notice of disaffirmation within four months, he had not given notice of disaffirmance in reasonable time.” But in England, by the Statute of May 9, 1882 (9 Geo. IV, ch. 14), entitled “An act for rendering a written memorandum necessary to the validity of certain promises and engagements,” it was provided that an infant should not be charged upon any promise or ratification after full age of any promise or simple contract made during infancy, unless the promise or ratification be made by writing, signed by the party to be charged. This statute was construed in *Hartley v. Wharton*, 11 Ad. & E. 934.

at maturity, and the lapse of a reasonable time, should hold the scales in his hands and decide as future circumstances should incline. In the meantime, the purchaser under him is at a standstill, and incapable of making any necessary and permanent improvements of his estate."¹ This principle is supported by considerable authority, and in some states it is declared by statute.² In California, where the contract of an infant is made under the age of eighteen, it may be disaffirmed by the minor himself either before his majority or within a reasonable time afterward, or by his heirs or personal representatives in case of his death, and if made while he is over the age of eighteen, it may be disaffirmed in the same mode by a restoration of the consideration, or its equivalent.³ In Delaware, it was decided that where extensive improvements had been made upon the property conveyed, an infant's acquiescence for four years amounted to a confirmation of his deed.⁴ It has been held that an infant's neglect after coming of age to disaffirm until the time named in the statute of limitations for bringing an action had expired, would operate as an affirmation of the deed or sale.⁵ In North Carolina, it was decided that

¹ *Kline v. Beebe*, per Hosmer, Chief Justice, 6 Conn. 494, 505. See, also, to same effect, *Thormaehlen v. Kaepfel*, 86 Wis. 378; *O'Dell v. Rogers*, 44 Wis. 136; *Scott v. Buchanan*, 11 Humph. 468; *Brantley v. Wolf*, 60 Miss. 420; *Thompson v. Strickland*, 52 Miss. 574; *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801; *Askey v. Williams*, 74 Tex. 294; *Nathans v. Arkwright*, 66 Ga. 179; *Blankenship v. Stout*, 25 Ill. 132; *Illinois Land Co. v. Bonner*, 75 Ill. 315; *Goodenow v. Empire Lumber Co.*, 31 Minn. 468; 47 Am. Rep. 798; *O'Brien v. Gaslin*, 20 Neb. 347; *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; *Ward v. Laverty*, 19 Neb. 429; *Amey v. Cockey*, 73 Md. 297.

² *Wallace v. Lewis*, 4 Har. (Del.) 75; *Wright v. Germain*, 21 Iowa, 585; *Jones v. Butler*, 30 Barb. 641; *Flinn v. Powers*, 36 How. Pr. 289; *Hoit v. Underhill*, 9 N. H. 439; 32 Am. Dec. 380. See *Jamison v. Smith* 35 La. An. 609; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696; *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25.

³ Civ. Code, § 35.

⁴ *Wallace v. Lewis*, 4 Har. (Del.) 75.

⁵ *Prout v. Wiley*, 28 Mich. 164; *Huth v. Carondelet etc. R. R. Co.*, 56 Mo. 202; *Thomas v. Pullis*, 56 Mo. 211; *Wallace v. Latham*, 52 Miss. 291. See *Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100.

where an infant bought a piece of land, and after his majority lived upon it and paid a portion of the purchase price, he had confirmed the transaction.¹ Where a minor married woman has executed a deed, it has been held that a delay of three years and a half unexplained, to disaffirm her deed after arriving at majority, is unreasonable.²

§ 90. Opposite view that acquiescence is not affirmance.—On the other hand, the principle adopted by many courts, among them the Supreme Court of the United States, is that acquiescence alone, though it may continue for an unreasonable period beyond majority, will not constitute affirmance. “Where a person has made a conveyance of real estate during infancy, and would affirm or disaffirm it after he becomes of age, in such case, mere acquiescence for years affords no proof of a ratification. There must be some positive and clear act performed for that purpose. The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty toward others to act speedily. . . . He may, therefore, after years of acquiescence, by an entry, or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy.”³ The rule in the United States Supreme Court

¹ *Dewey v. Burbank*, 77 N. C. 259. See *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89; 19 Am. Dec. 194; *Bostwick v. Atkins*, 3 Comst. 58.

² *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; 47 Am. Rep. 798. But see *Wilson v. Branch*, 77 Va. 65; 46 Am. Rep. 709. And see, also, *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374. But a suit brought to cancel a deed made when a minor is a sufficient disaffirmance, and what constitutes a reasonable time within which the right to disaffirm must be exercised is a mixed question of law and fact, the determination of which will depend upon the circumstances in each particular case: *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665.

³ *Shepley, J.*, in *Boody v. McKenney*, 23 Me. 517, 523; *Jackson v. Carpenter*, 11 Johns. 539; *Curtin v. Patten*, 11 Serg. & R. 311. But the justice in *Boody v. McKenney*, *supra*, remarks, however, that when an infant has purchased real estate, or has taken a lease of it subject to

is, that though an act of as solemn character as the original act itself is not necessary to operate as an affirmation of an infant's voidable deed, yet that mere acquiescence, unaccompanied by any other circumstance, is not generally sufficient evidence of affirmance. But any clear and unequivocal ratification manifesting an intention to affirm the deed will have that effect.¹ It has been objected that a long-continued acquiescence, unless it be held to be tantamount to a ratification, will operate as a fraud upon the grantee. Referring to this consideration, the court in Missouri declares: "The fact that an acquiescence for years operates as a fraud upon the grantee is no objection in law to such exercise of this right. The rule is made to protect the infant, and all disaffirmances necessarily, or at least generally, operate to some extent very prejudicially to the interests of the grantee, and may so far be regarded as a fraud upon his rights."²

rent, he must make his election within a reasonable time; he is not permitted to enjoy the estate for years after he becomes of age and then disaffirm the purchase. See, also, *Prout v. Wiley*, 28 Mich. 164; *Tyler v. Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; *Rundle v. Spencer*, 67 Mich. 189; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; *Hoffert v. Miller*, 86 Ky. 572; *Baker v. Kennett*, 54 Mo. 82; *Thomas v. Pullis*, 56 Mo. 211; *Huth v. Carondelet Marine Ry. Co.*, 56 Mo. 202; *Peterson v. Laik*, 24 Mo. 541; 60 Am. Dec. 441; *Drake v. Ramsey*, 5 Ohio, 252; *Cresinger v. Welch*, 15 Ohio, 156; 45 Am. Dec. 565; *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418; *Moore v. Abernathy*, 7 Blackf. 442; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Kountz v. Davis*, 34 Ark. 590; *Stull v. Harris*, 51 Ark. 294; *Vaughan v. Parr*, 20 Ark. 600; *McMurray v. McMundy*, 66 N. Y. 175; *Drake v. Ramsay*, 5 Ohio, 252; *Cresenger v. Welch*, 15 Ohio, 156; 45 Am. Dec. 565; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Wilson v. Branch*, 77 Va. 65; 46 Am. Rep. 709.

¹ *Irvine v. Irvine*, 9 Wall. 626; *Tucker v. Moreland*, 10 Peters, 59.

² *Huth v. Carondelet*, 56 Mo. 202, 210; per Napton, J. See *Urban v. Grimes*, 2 Grant Cas. 96; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; *Sims v. Everhardt*, 22 Alb. L. J. 445; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Sims v. Smith*, 86 Ind. 577. But where this rule prevails acquiescence with other circumstances, such as standing by and seeing the purchaser making valuable improvements, will be deemed a ratification: *Wallace v. Latham*, 52 Miss. 291; *Lacy v. Pixler*, 120 Mo. 383; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100;

§ 91. **Comments.**—The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmance on his part of his conveyance. The law considers his contract a voidable one on account of its tender solicitude for his rights, and its fear that he may be imposed upon in his bargains. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it. In other words, his case is one in which the maxim that "silence implies consent," may be applied with salutary effect. Then it is to be remarked that the grantee is entitled to some consideration. He should have a right to know whether the grantor intends to disaffirm his deed, and he should be justified in assuming that a neglect on the part of the grantor to express his dissent for a considerable length of time, is an affirmance as potent as any language could possibly be. The grantee should not be kept in suspense, and prevented from making valuable and permanent improvements, from the fear that at any time the grantor may disaffirm his deed, and render it a nullity. The grantor should not be allowed to take advantage of the increase in value of the land, that may be brought about by a number of causes which were unforeseen by both parties at the time the conveyance was executed, while he is under no corresponding obligation to rescind in case the land depreciates in value.

Sims v. Bardoner, 86 Ind. 87; 44 Am. Rep. 263; *Birch v. Linton*, 78 Va. 584; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Hartman v. Kendall*, 4 Ind. 403; *Wallace v. Lewis*, 4 Harr. 75.

Justice requires that he should arrive at a definite conclusion with a reasonable degree of celerity, or be held to have given his assent to the deed. While the opposite view is supported by eminent authority, yet the author is of the opinion that in reason a long-continued silence on the part of the grantor, after the removal of the disability of infancy, should be regarded as an acquiescence in his act, and a ratification of his conveyance.

§ 92. By what means the deed of an infant may be avoided.—An infant may avoid his deed after reaching his majority by different means, depending upon the nature of, and the circumstances of the case.¹ An unconditional sale of the property by the grantor after arriving at full age is a disaffirmance of his first deed. This is an act which clearly evinces a desire to disaffirm.² Thus, where an infant had conveyed uncultivated lands, and after coming of age conveyed the same lands to another, by a deed which was properly registered, the last deed was held to be a disaffirmance of the first.³

¹ Tucker v. Moreland, 10 Peters, 58. Justice Story, on page 71, says: "He may sometimes avoid it by matter *in pais*, as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as when he has acknowledged a recognizance or statute, staple or merchant; sometimes, as in the case of an alienation of his estate during his nonage, by a writ of entry, *dum fuit infra ætatem*, after his arrival of age."

² Chapin v. Shafer, 49 N. Y. 407; Medbury v. Watrous, 7 Hill, 117; State v. Plaisted, 43 N. H. 413; Cresinger v. Welch, 15 Ohio, 193; 45 Am. Dec. 565; Skinner v. Maxwell, 66 N. C. 45; Pitcher v. Laycock, 7 Ind. 398; Peterson v. Laik, 24 Mo. 541; 69 Am. Dec. 441; Searcy v. Hunter, 81 Tex. 644; 26 Am. St. Rep. 837; Riggs v. Fisk, 64 Ind. 100; Vallandingham v. Johnson, 85 Ky. 288; Hastings v. Dollarhide, 24 Cal. 195; Singer Mfg. Co. v. Lamb, 81 Mo. 221; Corbett v. Spencer, 63 Mich. 731; Craig v. Van Bebber, 100 Mo. 584; 18 Am. St. Rep. 569; Bagley v. Fletcher, 44 Ark. 153; McGan v. Marshall, 7 Humph. 121; Haynes v. Bennett, 53 Mich. 15; Prout v. Wiley, 28 Mich. 164; Dawson v. Helmes, 30 Minn. 107; Cresinger v. Welch, 15 Ohio, 156; 45 Am. Dec. 565; White v. Flora, 2 Overt. 426; Mustard v. Wohlford, 15 Gratt. 329; 76 Am. Dec. 209; Black v. Hills, 36 Ill. 376; 87 Am. Dec. 224.

³ Jackson v. Carpenter, 11 Johns. 539. But if the first grantee was

§ 93. Subsequent deed must be inconsistent with prior one.—But in order that a subsequent deed by an infant after reaching his majority may operate as a disaffirmance of his prior deed, it must be inconsistent with it, so that both cannot properly stand together. Thus, an infant conveyed real estate, and his grantee before the coming of age of the infant mortgaged it to one party and sold it to another. The latter obtained a quitclaim deed from the infant grantor, and when a bill was brought to foreclose the mortgage, he attempted to defeat the lien of the mortgagee by asserting that the deed to him was a disaffirmance of the deed to the mortgagor, the original grantee of the infant; but it was held that the subsequent deed of the infant was intended as a mere confirmation of the previous title, and not as a disaffirmance of the previous conveyance.¹ If a minor sells the same property twice, and when he has attained majority, ratifies the second sale, this, it has been held in Alabama, is a disaffirmance of the first sale.² In the same state, it has been held that if an infant, on arriving at full age, disaffirm his deed and bring an action against the vendee for the use and occupation of the premises, the latter may set off to the amount claimed the value of improvements erected

in possession, it seems in New York that an entry would be necessary; *Jackson v. Burchin*, 14 Johns. 127; *Jackson v. Todd*, 6 Johns. 257. See *Roberts v. Wiggin*, 1 N. H. 75; 8 Am. Dec. 38; *Dawson v. Helmes*, 30 Minn. 107.

¹ *Eagle Fire Co. v. Lent*, 6 Paige, 635. See, also, *Stewart v. Baker*, 17 Tex. 417; *Watkins v. Russell*, 15 Ark. 73; *Bagley v. Fletcher*, 44 Ark. 153; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Palmer v. Miller*, 25 Barb. 399. The act of avoidance should take place before suit: *Voorhies v. Voorhies*, 24 Barb. 150. See *Palmer v. Miller*, 25 Barb. 399; *Dominick v. Michael*, 4 Sand. 374, 421; *Dawson v. Helmes*, 30 Minn. 107.

² *Derrick v. Kennedy*, 4 Port, 41. The deed may be avoided as against a *bona fide* purchaser from the grantee for value, for if this were not so the grantee could make the sale valid by transferring to an innocent purchaser: *Buchanan v. Hubbard*, 96 Ind. 1; *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *Sims v. Smith*, 86 Ind. 577; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705; *Miles v. Lingerian*, 24 Ind. 385; *Jenkins v. Jenkins*, 12 Iowa, 195; *Mustard v. Wohlford*, 15 Gratt. 329; 76 Am. Dec. 209.

upon the land.¹ In Indiana, a written notice of disaffirmance of a deed by an infant after he reaches full age is an avoidance of his conveyance made during infancy.²

§ 94. Restoring the consideration—General rule.—Must an infant as a condition upon which his right of disaffirmance depends restore the consideration received? The rule seems to be that when the infant still has the property in his possession at the time he disaffirms, or had possessed it at the time he reached his majority, but had squandered it afterwards, he must restore the consideration or its equivalent.³

§ 95. Exception in Indiana.—An exception to this general rule, however, appears to prevail in Indiana.⁴ In the case cited the court, speaking on this point, said: "The exception reserved upon the failure to prove an offer to return the purchase money is not well taken. Where the plaintiff is in the possession of the property, and comes into a court of equity asking to have some cloud removed from her title, she must restore any con-

¹ *Weaver v. Jones*, 24 Ala. 421.

² *Scranton v. Stewart*, 52 Ind. 69. See *Worcester v. Eaton*, 13 Mass. 371; 7 Am. Dec. 155; *McGill v. Woodward*, Const. S. C. 468; *Mustard v. Wohlford*, 15 Gratt. 329; 76 Am. Dec. 209; *Walker v. Ellis*, 12 Ill. 470; *Prout v. Wiley*, 28 Mich. 164.

³ *Womack v. Womack*, 8 Tex. 397; 58 Am. Dec. 119; *Stuart v. Baker*, 17 Tex. 417; *Pursley v. Hays*, 17 Iowa, 311; *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Smith v. Evans*, 5 Humph. 70; *Bartholomew v. Finnemore*, 17 Barb. 428; *Gray v. Lessington*, 2 Bosw. 257; *Ottman v. Moak*, 3 Sandf. Ch. 431; *Kitchen v. Lee*, 11 Paige, 107; 42 Am. Dec. 101; *Roof v. Stafford*, 7 Cowen, 179; *Farr v. Sumner*, 12 Vt. 28; 36 Am. Dec. 327; *Taft v. Pike*, 14 Vt. 405; 39 Am. Dec. 228; *Locke v. Smith*, 41 N. H. 346; *Strain v. Wright*, 7 Ga. 568; 2 Kent's Com. 240; *Tyler on Infancy and Coverture*, 2d ed., 79.

⁴ *Miles v. Lingerman*, 24 Ind. 385. In some states it is held that the grantor must restore the consideration although he may have spent it: *Womack v. Womack*, 8 Tex. 397; 58 Am. Dec. 119; *Stuart v. Baker*, 17 Tex. 417; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801; *Wade v. Love*, 69 Tex. 522; *Ferguson v. Houston etc. Ry. Co.*, 73 Tex. 344; *Fitts v. Hall*, 9 N. H. 441; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209; *Heath v. Stevens*, 48 N. H. 251.

sideration received from the defendant; she must do equity. But when having by her own act avoided the deed, she comes into a court of law demanding possession of property to which she holds a perfect title, no equitable conditions can be imposed upon her by the court. She comes, not invoking the aid of the court to remove a cloud from her title, but demanding possession of property, the title to which she has by her own act rendered perfect without assistance from the equitable power of the court.”¹

§ 96. Where minor has not retained consideration. If on the other hand, the infant has wasted or squandered during infancy the money or consideration received, and on coming of age disaffirms and repudiates the transaction, he may do so without restoring the consideration, and the adult who had dealt with him is accordingly remediless. There has been much dissatisfaction expressed with this rule, but it seems to be established by the weight of authority.² So it has been held that a purchaser from a person after majority who while a minor

¹ *Miles v. Lingerman*, *supra*.

² *Edgerton v. Wolf*, 6 Gray, 456; *Mustard v. Wohlford*, 15 Gratt. 329, 343; 76 Am. Dec. 209; *Bedinger v. Wharton*, 27 Gratt. 857; *Fitts v. Hall*, 9 N. H. 441; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117; *Green v. Green*, 7 Hun, 492; *Gibson v. Soper*, 6 Gray, 279, 282; 66 Am. Dec. 414; *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *Dill v. Bowen*, 54 Ind. 204; *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732; *Bigelow v. Kinney*, 3 Vt. 353, 358; 21 Am. Dec. 589; *Williams v. Norris*, 2 Litt. Sel. Cas. 157, 158; *Smith v. Evans*, 5 Humph. 70; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Hill v. Anderson*, 5 Smedes & M. 216; *Walsh v. Young*, 110 Mass. 396, 399; *Gillespie v. Bailey*, 12 W. Va. 92; 29 Am. Rep. 445; *Sims v. Everhardt*, 102 U.S. 300; *Dawson v. Helmes*, 30 Minn. 107; *Craig v. Van Bebber*, 100 Mo. 584; 18 Am. St. Rep. 569; *Clark v. Tate*, 7 Mont. 171; *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Stull v. Harris*, 51 Ark. 294; *St. Louis etc. Ry. Co. v. Higgins*, 44 Ark. 293; *Goodman v. Winter*, 64 Ala. 410; 38 Am. Rep. 113; *Reynolds v. McCurry*, 100 Ill. 356; *Miles v. Lingerman*, 24 Ind. 385; *Brantley v. Wolf*, 60 Miss. 420. In *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, the earlier case of *Highley v. Barron* is overruled, and in *Brantley v. Wolf*, 60 Miss. 420, the case of *Ferguson v. Bobo*, 54 Miss. 121, is overruled. But see *Stout v. Merrill*, 35 Iowa, 47; *Kerr v. Bell*, 44 Mo. 120; *Hillyer v. Bennett*, 3 Edw. Ch. 222.

had executed a deed and received and consumed the purchase money, is not required on a bill to obtain the cancellation of the infant's deed, to tender back the purchase money received by the infant.¹ But he must restore such part of the consideration that he received for his conveyance as he may have retained at the time at which he attains his majority.² If no consideration was paid for the conveyance, or if it was paid to another, the right of the grantor to disaffirm the deed is not dependent upon his offering to restore any consideration.³ The grantor, on disaffirming, must, however, part with any mortgage or security that he may have taken in the transaction.⁴ If it is attempted to defeat the right of the grantor to disaffirm for not restoring the consideration, the contestant must show the amount received by the minor and the amount that he still had on attaining majority.⁵

§ 97. What is a sufficient ratification of an infant's deed.—Slighter acts and circumstances will operate as a

¹ *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314. See *Dawson v. Helmes*, 30 Minn. 107.

² *Craig v. Van Bebbler*, 100 Mo. 584; 18 Am. St. Rep. 569; *Shurtleff v. Millard*, 12 R. 1. 272; 34 Am. Rep. 640; *Bedinger v. Wharton*, 27 Gratt. 857; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732; *Dill v. Bowen*, 54 Ind. 204.

³ *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; *Vogelsang v. Null*, 67 Tex. 465.

⁴ *Knaggs v. Green*, 48 Wis. 601; 33 Am. Rep. 838; *Boody v. McKenney*, 23 Me. 517; *Kerr v. Bell*, 44 Mo. 120; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117; *Callis v. Day*, 38 Wis. 643; *Wilie v. Brooks*, 45 Miss. 542; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Brantley v. Wolf*, 60 Miss. 420; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; *Kline v. Beebe*, 6 Conn. 494; *Bailey v. Barnberger*, 11 B. Mon. 113; *Thormaehlen v. Kaepfel*, 86 Wis. 378.

⁵ *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665; *Reynolds v. McCurry*, 100 Ill. 356; *Lacy v. Pixler*, 120 Mo. 383; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407; *Bloomer v. Nolan*, 36 Neb. 51; 38 Am. St. Rep. 690. That the grantor is not required to restore the consideration where he has wasted it, see *Shuford v. Alexander*, 74 Ga. 293; *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374; *Robinson v. Weeks*, 56 Me. 102; *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101; *Walsh v. Young*, 110 Mass. 396; *Ruchizky v. De Haven*, 97 Pa. St. 202.

ratification in cases of purchases and executed contracts by infants than in cases of conveyances and executory contracts.¹ By the purchase of land the freehold is vested in the infant until he disagrees to the transaction.² Where an infant made a mortgage of his land, and after coming of age conveyed the property subject to the mortgage, it was held that the second deed confirmed the mortgage.³ The effect that mere acquiescence has, as an act of confirmation, has been discussed on a previous page, to which the reader is referred. An infant may confirm his deed by a recital of affirmance in a subsequent deed after attaining majority.⁴ Where an infant and another exchanged executed conveyances, and the infant sold the land received in exchange, the sale was considered a ratification.⁵ Where an infant executed a deed, and after her majority expressed satisfaction with the transaction, received part of the consideration, and declared her intention to make a confirmatory deed, but died suddenly without having done so, it was held that there was a sufficient ratification.⁶ The execution of a mortgage

¹ *Robbins v. Eaton*, 10 N. H. 561; *Boody v. McKenney*, 23 Me. 517; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Alexander v. Heriot*, 1 Bail. Eq. 223; *Kline v. Beebe*, 6 Conn. 494; *Phillips v. Green*, 5 Mon. 344; *Belton v. Briggs*, 4 Desaus. Eq. 465; *Deason v. Boyd*, 1 Dana, 45; *Barnaby v. Barnaby*, 1 Pick. 221.

² *Tyler on Infancy and Coverture*, § 43; 2 Vent. 203. The acceptance of a reconveyance from the grantee of a part of the land is a ratification: *McCormic v. Leggett*, 8 Jones, 425; *Ferguson v. Bell*, 17 Mo. 347.

³ *Boston Bank v. Chamberlin*, 15 Mass. 220. See *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89; 19 Am. Dec. 194; *Richardson v. Boright*, 9 Vt. 368; *Losey v. Bond*, 94 Ind. 67; *Ward v. Anderson*, 111 N. C. 115; *Scott v. Buchanan*, 11 Humph. 468; *Allen v. Poole*, 54 Miss. 323; *Phillips v. Green*, 5 T. B. Mon. 344.

⁴ *Phillips v. Green*, 5 Mon. 344, 355.

⁵ *Williams v. Mabee*, 3 Halst. Ch. 500. See *Buchanan v. Hubbard*, 119 Ind. 187; *Eagle Fire Co. v. Lent*, 1 Edw. Ch. 301; s. c. 6 Paige, 635; *Houser v. Reynolds*, 1 Hayw. (N. C.) 143; 1 Am. Dec. 551; *Riggs v. Fisk*, 8 Cent. L. J. 325; *Hughes v. Watson*, 10 Ohio, 127; *Blankenship v. Stout*, 25 Ill. 132; *Howe v. Howe*, 99 Mass. 98; *Cole v. Pennoyer*, 14 Ill. 158.

⁶ *Ferguson v. Bell*, 17 Mo. 347. See *Petersen v. Laik*, 24 Mo. 541; 69 Am. Dec. 441. A mortgagor ratifies a mortgage by accepting, after he

made during minority is ratified by the execution of a deed after majority, reciting that it is subject to the mortgage.¹

§ 98. Delivery of deed after majority.—Where an infant has signed and acknowledged a deed and placed it in the hands of another for delivery, but it is not actually delivered until after the grantor has attained his majority, the deed is not voidable on account of the grantor's infancy. It did not become effectual until delivery, and then the grantor was competent to act.²

§ 99. Purchaser with knowledge of an infant's prior conveyance.—It seems that if an infant convey land, and on attaining his majority ratify the conveyance, and then conveys to another person for a valuable consideration, the latter, though he may have notice of the deed made in infancy, but not of the ratification, will have a valid title to the land. In a case in which this question arose, the court announced the rule that one has a perfectly legal right to purchase land which his grantor had conveyed during his minority, as he has to purchase land which had never been conveyed, and that he is not to be denied the position of an innocent purchaser because he has notice of the deed made in infancy. In support of this conclusion it said: "The right would be practically of little value to the minor if the person buying of him, after he becomes of age, is to be considered as incurring in any way the censure of the law, and to be, therefore,

becomes of age, a part of the proceeds of a foreclosure sale: *Darraugh v. Blackford*, 84 Va. 509.

¹ *Losey v. Bond*, 94 Ind. 67; and see *Trader v. Jarvis*, 23 W. Va. 100.

² *Sims v. Smith*, 99 Ind. 469; 50 Am. Rep. 99. A reacknowledgment or a redelivery of a deed by the grantor after attaining majority is a sufficient ratification: *Murray v. Shanklin*, 4 Dev. & B. 289; *Palmer v. Miller*, 25 Barb. 399; *Davidson v. Young*, 38 Ill. 145. To make a ratification valid it is not necessary that the grantor should know that he had a legal right to disaffirm the deed: *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774; *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 754; *Anderson v. Soward*, 40 Ohio St. 325; 48 Am. Rep. 687; *Ring v. Jamison*, 66 Mo. 424; 2 Mo. App. 584; *Morse v. Wheeler*, 4 Allen, 570.

denied the position of an innocent purchaser. It does not devolve upon him to investigate whether in the particular case his grantor ought to disaffirm, as a question of morals, between him and the first grantee. It is enough for him to know that the law gives the absolute right to disaffirm in every case, and he may presume that his grantor is exercising that right for reasons that would be as satisfactory in the forum of conscience as the act is valid in a court of law.”¹

§ 100. Deeds of married women.—The deed of a *feme covert*, purporting to transfer her interest in land held by her in fee, does not, as a general proposition, convey such interest by its mere execution and delivery, as would be the result if the deed were made by a person under no disability. Unless a married woman acknowledges her deed in the form prescribed by statute the law presumes she has acted under the coercion of her husband.² At common law, the deed of a married woman was void; she could pass her title to real estate only by a fine or common recovery.³ While this rule has been abrogated, and a married woman is now in almost every state of the Union permitted to alienate her lands, under certain restrictions, it is established that the statute must be closely followed, and that a deed which does not observe the requirements of the statute is absolutely void.⁴

§ 101. Joint deed of husband and wife.—In several of the states a married woman can convey her real estate only by a joint deed executed by herself and husband,

¹ *Black v. Hills*, 36 Ill. 376, 380; 87 Am. Dec. 224.

² *Hepburn v. Dubois*, 12 Peters, 345.

³ 2 Blackst. Com. 293.

⁴ *McClure v. Douthitt*, 6 Pa. St. 414; *Glidden v. Strupler*, 52 Pa. St. 400; *Kirkland v. Hepselgefer*, 2 Grant Cas. 84; *Trimmer v. Heagy*, 16 Pa. St. 484; *Sulp v. Campbell*, 19 Pa. St. 361; *Peck v. Ward*, 18 Pa. St. 506; *Stoops v. Blackford*, 27 Pa. St. 213; *Pettit v. Fretz*, 33 Pa. St. 118; *Rumfelt v. Clemens*, 46 Pa. St. 455; *Thorndell v. Morrison*, 25 Pa. St. 326; *Millenberger v. Croyle*, 27 Pa. St. 170; *Richards v. McClelland*, 29 Pa. St. 385; *Roseburg's Exrs. v. Sterling's Heirs*, 27 Pa. St. 292.

and acknowledged separate and apart from her husband.¹ In Maine and New Hampshire, the rigor of the early rule has been somewhat relaxed.² In Vermont, the husband must unite with the wife in the conveyance of her estate, with the exception that the wife, in the event of the husband's desertion and ill-treatment, may convey her property without joining her husband.³

§ 102. **In New York.**—In New York, a married woman was formerly required to acknowledge her deed on a private examination before some officer authorized to take an acknowledgment, and this examination was required to be separate and apart from her husband. Under this statute it was held that the deed of a married woman, unless acknowledged in the manner prescribed, was of no validity.⁴ The wife, however, was regarded as a *feme sole*, so far as her separate estate, essentially such, was concerned.⁵ But in that state, it is now provided by statute,

¹ *Rowe v. Hamilton*, 3 Me. 63; *Ex parte Thomes*, 3 Me. 50; *Shaw v. Russ*, 14 Me. 432; *Holt v. Agnew*, 67 Ala. 360; *Lane v. McKean*, 15 Ala. 304; *Call v. Perkins*, 65 Me. 439; *Payne v. Parker*, 10 Me. 178; 25 Am. Dec. 221; *Buchanan v. Hazzard*, 95 Pa. St. 240; *Fowler v. Shearer*, 7 Mass. 14; *Andrews v. Hooper*, 13 Mass. 476; *Concord Bank v. Bellis*, 10 Cush. 276; *Ela v. Card*, 2 N. H. 176; 9 Am. Dec. 46; *Gordon v. Haywood*, 2 N. H. 402; *Sumner v. Conant*, 10 Vt. 20; *Whiting v. Stevens*, 4 Conn. 44; *Hyde v. Morgan*, 14 Conn. 104; *Durant v. Ritchie*, 4 Mason, 45; *Hall v. Savage*, 4 Mason, 273; *Powell v. The Monson & B. Mfg. Co.*, 3 Mason, 347; *Manchester v. Hough*, 5 Mason, 67. As to whether the husband should be named in the body of the deed as grantor there is a difference of opinion. On one side see *Blythe v. Dargin*, 68 Ala. 370, and on the other *Evans v. Summerlin*, 19 Fla. 858.

² *Strickland v. Bartlett*, 51 Me. 355; *Bean v. Boothby*, 57 Me. 295; *Woodward v. Seaver*, 38 N. H. 29.

³ *Frary v. Booth*, 37 Vt. 78. A husband may express his assent under his hand and seal without becoming a formal party to the deed: *Bray v. Clapp*, 80 Me. 277; 6 Am. St. 197.

⁴ *Jackson v. Stevens*, 16 Johns. 110; *Jackson v. Cairns*, 20 Johns. 301; *Doe v. Howland*, 8 Cowen, 277; 18 Am. Dec. 445; *Gillett v. Stanley*, 1 Hill, 121; *Galliano v. Lane*, 2 Sand. Ch. 147; *Curtiss v. Follett*, 15 Barb. 337; *Van Nostrand v. Wright*, Lalor, 260.

⁵ *Powell v. Murray*, 2 Edw. Ch. 636; s. c. 10 Paige, 256. See as to construction of Acts of 1848 and 1849, *Cramer v. Comstock*, 11 How. Pr. 486; *Firemen's Ins. Co. v. Bay*, 4 Barb. 407; s. c. 4 N. Y. 9; *Blood v. Humphrey*, 17 Barb. 660.

that the acknowledgments of a married woman may be taken and certified in the same manner as if she were sole.¹

§ 103. In Massachusetts.—The separate deed of a married woman, attempting to convey her real estate, was, prior to the enactment of statutes relating to the separate estates of married women, held to be void.² But the acknowledgment of the husband alone was deemed to be sufficient, though the signatures of both were necessary to its execution.³ But the assent of the husband to his wife's conveyance is no longer necessary, and she has the same power to convey real estate as if she were unmarried.⁴

§ 104. In New Jersey.—The husband must join in the deed of the wife or the conveyance will be void.⁵ And she must acknowledge the execution of the deed upon a private examination without the hearing of her husband.⁶ The rule that both husband and wife must join in the conveyance is applied with strictness.⁷

§ 105. In Ohio.—The wife must be made acquainted with the contents of the deed, and must acknowledge its

¹ Laws of 1880, ch. 300.

² *Lithgow v. Kavenagh*, 9 Mass. 161; *Warner v. Cranch*, 14 Allen, 163; *Lufkin v. Curtis*, 13 Mass. 223; *Melvin v. Locks*, 16 Pick. 137; *Gerrish v. Mason*, 4 Gray, 432; *Bruce v. Wood*, 1 Met. 542; 35 Am. Dec. 380; *Townsend v. Chapin*, 12 Allen, 476; *Leggate v. Clark*, 111 Mass. 308; *Cormerais v. Wesselhoeft*, 114 Mass. 550; *Child v. Sampson*, 117 Mass. 62; *Weed Sewing M. Co. v. Emerson*, 115 Mass. 554; *Beal v. Warren*, 2 Gray, 447; *Dresel v. Jordan*, 104 Mass. 407.

³ *Dudley v. Sumner*, 5 Mass. 438; *Catlin v. Ware*, 9 Mass. 220; 6 Am. Dec. 56. See *Gibbs v. Swift*, 12 Cush. 393; *Call v. Buttrick*, 4 Cush. 345; *Dole v. Thurlow*, 12 Met. 158; *Shaw v. Poor*, 6 Pick. 86; 17 Am. Dec. 347.

⁴ Laws of 1874, ch. 184.

⁵ *Armstrong v. Ross*, 20 N. J. Eq. 109; *Moore v. Rake*, 2 Dutch. 574; *Den v. Crawford*, 3 Halst. 90.

⁶ *Marsh v. Mitchell*, 26 N. J. Eq. 497. If the certificate of acknowledgment state that she was examined separate and apart from her husband, it is regarded as a compliance with the statute, though it fails to state that she was examined separate and apart from her husband: *Thayer v. Torrey*, 37 N. J. L. 339.

⁷ *Kearney v. Macomb*, 16 N. J. Eq. 189.

execution upon an examination separate and apart from her husband, and the officer taking the acknowledgment is required so to certify.¹ But an action may be maintained under the provisions of a statute to correct the certificate of acknowledgment when it omits to state that she was examined separately.²

§ 106. **In Pennsylvania.**—A separate deed by the wife is ineffectual to pass title; both husband and wife must join in the conveyance.³ The wife is required to acknowledge the deed upon an examination separate and apart from her husband.⁴ If the acknowledgment is defective, rendering the deed void, she may after her husband's death ratify it, and parol evidence is admitted to show such ratification.⁵ Though both husband and wife have executed a deed, yet if it has not been delivered until after her death, it will not be enforced against her heirs.⁶

§ 107. **In other States.**—Without entering into details, the law relating to the conveyances of married women in the other states will be briefly stated. In Alabama, Florida, Louisiana, Delaware, Missouri, Georgia, Maryland, Kentucky, Virginia, West Virginia, North Carolina, Mississippi, Tennessee, and Texas, the husband must join in the wife's conveyance. In Kentucky, the court has the power upon the petition of husband and wife, to authorize the wife to sell her property without the concurrence of her husband. In West Virginia, the wife may convey her property by her separate deed when living apart from her husband. In Texas, where lands

¹ *Bocock v. Pavey*, 8 Ohio St. 270.

² *Kilbourn v. Fury*, 26 Ohio St. 153.

³ *Buchanan v. Hazzard*, 95 Pa. St. 240; *Richards v. McClelland*, 29 Pa. St. 385; *Glidden v. Strupler*, 52 Pa. 400; *Dunham v. Wright*, 53 Pa. 167. But see *Elsey v. McDaniel*, 95 Pa. St. 472.

⁴ *Davey v. Turner*, 1 Dall. 11; *Lloyd v. Taylor*, 1 Dall. 17; *Watson v. Bailey*, 1 Binn. 470; 2 Am. Dec. 462.

⁵ *Jourdan v. Jourdan*, 9 Serg. & R. 268; 11 Am. Dec. 724.

⁶ *Shoenberger v. Zook*, 34 Pa. St. 24; *Shoenberger v. Hackman*, 37 Pa. St. 87.

are settled upon the wife for her exclusive benefit, she may dispose of the same individually, if there is nothing in the deed of settlement restricting her power of conveyance. In North Carolina, a wife may convey her property with the written consent of her husband.¹ In Alabama, where a wife held under a deed of gift from her husband to her and her children, which authorized her to sell when she saw proper, it was held that her deed signed also by the husband was sufficient, although the husband was not named in the body of the deed as a party.² In Indiana, Illinois, Minnesota, and Oregon, the separate real estate of the wife can be conveyed only by a deed executed by herself and husband. In Indiana, if the husband is insane, the wife may convey her separate property without her husband's action, and in case of the husband's abandonment or imprisonment in the penitentiary she may be authorized by the court to convey her real estate; while in Illinois, the wife may alienate her own lands, yet as the husband is entitled to a third part of her estate of inheritance unless he waives it, a deed

¹ *Alabama*—Fisk v. Stubbs, 30 Ala. 335; Mathews v. Sheldon, 53 Ala. 136; Hammond v. Thompson, 56 Ala. 589. *Georgia*—Seabrook v. Brady, 47 Ga. 650; Wynn v. Ficklen, 54 Ga. 529. *Maryland*—Gelston v. Frazier, 26 Md. 329; Preston v. Fryer, 38 Md. 221; Schley v. McCeney, 36 Md. 266; Gebb v. Rose, 40 Md. 387; Whitridge v. Barry, 42 Md. 140; Lawrence v. Heister, 3 Har. & McH. 371. *Kentucky*—Miller v. Shackelford, 3 Dana, 289; Powell v. Powell, 5 Bush, 619; 96 Am. Dec. 372; Bowen v. Seabee, 2 Bush, 112; Latimer v. Glenn, 2 Bush, 535; Whitaker v. Blair, 3 Marsh. J. J. 241. *Virginia*—Sexton v. Pickering, 3 Rand. 468; Evans v. Kingsberry, 2 Rand. 120; 14 Am. Dec. 779. *West Virginia*—Laughlin v. Fream, 14 W. Va. 322. *North Carolina*—Gilchrist v. Buie, 1 Dev. & B. 359; Davis v. Duke, 2 Hayw. (N. C.) 401. *Mississippi*—Hand v. Winn, 52 Miss. 784; Toulmin v. Heidelberg, 32 Miss. 268; 14 Am. Dec. 779; Ezelle v. Parker, 41 Miss. 520; Sellars v. Kelly, 45 Miss. 323. *Tennessee*—Cope v. Meeks, 3 Head, 387; Parker v. Parker, 4 Lea, 392; Gillespie v. Worford, 2 Cold. 632; Matherson v. Davis, 2 Cold. 443. See Chadwell v. Wheless, 6 Lea, 312. *Texas*—Patton v. King, 26 Tex. 685; 84 Am. Dec. 596. In Missouri, where the husband is an alien, residing in a foreign country, it is held that the wife may dispose of her estate as though she were unmarried: Gallagher v. Delargy, 57 Mo. 29.

² Holleman v. De Nyse, 51 Ala. 95. See, also, Friendenwald v. Mullan, 10 Heisk. 226.

from both is generally required.¹ As a general rule, in Iowa, Nebraska, Wisconsin, Michigan, California, Nevada, and Colorado, a wife may sell her separate estate without the joinder of her husband. But in California, she is required to acknowledge her deed separate and apart from her husband, and the acknowledgment is part of the deed.² In Colorado, it was held that by a power of attorney executed by husband and wife to sell all their real estate in a certain county, the attorney was authorized to convey the separate property of the wife in that county.³ In South Carolina and Arkansas there are constitutional provisions authorizing married women to convey their property as if they were sole.⁴ In nearly all the States, however, the wife is required to acknowledge the execu-

¹ *Indiana*—Kinnaman v. Pyle, 44 Ind. 275; Shumaker v. Johnson, 35 Ind. 33; Bowers v. Van Winkle, 41 Ind. 432; McCormick v. Hunter, 50 Ind. 186; Baxter v. Bodkin, 25 Ind. 172; Mattox v. Hightshue, 39 Ind. 257; Abdil v. Abdil, 26 Ind. 287; Farley v. Eller, 29 Ind. 322; Stevens v. Parish, 29 Ind. 260; 95 Am. Dec. 636; Ellis v. Kenyon, 25 Ind. 134; Philbrooks v. McEwen, 29 Ind. 347; Buell v. Shuman, 28 Ind. 464; Scott v. Purcell, 7 Blackf. 66; 39 Am. Dec. 453. *Illinois*—Cole v. Van Riper, 44 Ill. 58; Rogers v. Higgins, 48 Ill. 211; Scovil v. Kelsey, 46 Ill. 344; 95 Am. Dec. 415; Hoyt v. Swar, 53 Ill. 134; Marston v. Brittenham, 76 Ill. 611; Stiles v. Probst, 69 Ill. 382; Bressler v. Kent, 61 Ill. 426; 14 Am. Rep. 67. *Minnesota*—Pond v. Carpenter, 12 Minn. 430; Dixon v. Merritt, 21 Minn. 196. See, also, Lindley v. Smith, 58 Ill. 250; Terry v. Eureka College, 70 Ill. 236; Merritt v. Yates, 71 Ill. 636; 22 Am. Rep. 128.

² *Iowa*—O'Neil v. Vanderburg, 25 Iowa, 104; Pursley v. Hayes, 22 Iowa, 11; 92 Am. Dec. 350; Green v. Scranage, 19 Iowa, 461; 87 Am. Dec. 447; Wolff v. Van Metre, 19 Iowa, 134; Childs v. McChesney, 20 Iowa, 431; 89 Am. Dec. 545; Sanborn v. Casady, 21 Iowa, 77. *Michigan*—Hovey v. Smith, 22 Mich. 170. *Nebraska*—Hale v. Christy, 8 Neb. 264. *California*—Dentzel v. Waldie, 30 Cal. 138; Bodley v. Ferguson, 30 Cal. 511; Smith v. Greer, 31 Cal. 476; Dow v. The Gould & Curry S. M. Co., 31 Cal. 629; Barrett v. Tewksbury, 9 Cal. 13; Kendall v. Miller, 9 Cal. 591.

³ Clayton v. Spencer, 2 Colo. 378. In Iowa, where the name of the wife was signed to the deed, and the certificate of acknowledgment recited its execution by her and her relinquishment of dower, but her name did not appear in the body of the deed, it was held that her real estate did not pass by the conveyance: Heaton v. Fryberger, 38 Iowa, 185. See Simms v. Hervey, 19 Iowa, 273; Huston v. Seeley, 27 Iowa, 183.

⁴ See Roberts v. Wilcoxson, 36 Ark. 355; Miller v. Fisher, 1 Ariz. 232; Charauleau v. Woffenden, 1 Ariz. 243.

tion of the deed upon an examination separate and apart from her husband. The certificate of acknowledgment must show that there has been a compliance with all the requirements of the statute.¹ Although the deed of a married woman may have been executed in the manner required by statute, yet her infancy will render it voidable.²

¹ *Brundige v. Poor*, 2 Gill & J. 1; *Nicholson v. Hemsley*, 3 Har. & McH. 409; *Lewis v. Waters*, 3 Har. & McH. 430; *Webster's Lessee v. Hall*, 2 Har. & McH. 19; 1 Am. Dec. 370; *Young v. The State*, 7 Gill & J. 253; *Belcher v. Weaver*, 46 Tex. 293; 28 Am. Rep. 267; *Pool v. Chase*, 46 Tex. 207; *Fitzgerald v. Turner*, 43 Tex. 79; *Smith v. Elliott*, 39 Tex. 201; *Rice v. Peacock*, 37 Tex. 392; *Brown v. Moore*, 38 Tex. 645; *Nichols v. Gordon*, 25 Tex. Supp. 109; *Fleming v. Nix*, 14 Fla. 268; *Waddell v. Weaver*, 42 Ala. 293; *Johnston v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Allen v. Lenoir*, 53 Miss. 321; *Willis v. Gattman*, 53 Miss. 721; *Bernard v. Elder*, 50 Miss. 336; *Campbell v. Taul*, 3 Yerg. 548; *Lasseter v. Turner*, 1 Yerg. 413; *Edmonson v. Harris*, 2 Tenn. Ch. 427; *Heath v. Edur*, 1 Har. & J. 751; *Grove v. Zumbro*, 14 Gratt. 501; *McChesney v. Brown's Heirs*, 25 Gratt. 393; *Hawley v. Twyman*, 29 Gratt. 728; *Tod v. Baylor*, 4 Leigh, 498; *Countz v. Geiger*, 1 Call, 193; *Nelson v. Harwood*, 3 Call, 394; *Harvey v. Pecks*, 1 Munf. 518; *Wannell v. Kem*, 57 Mo. 478; *Barker v. Circle*, 60 Mo. 258; *Devorse v. Snider*, 60 Mo. 235; *Sharpe v. McPike*, 62 Mo. 300; *Paul v. Carpenter*, 70 N. C. 502; *Gilchrist v. Buie*, 1 Dev. & B. 359; *Davis v. Duke*, 2 Hayw. 401; *McCreary v. McCreary*, 9 Rich. Eq. 34; *Bartlett v. Fleming*, 3 W. Va. 163; *Leftwich v. Neal*, 7 W. Va. 569; *Linn v. Patton*, 10 W. Va. 198; *Laughlin v. Fream*, 14 W. Va. 322; *Moorman v. Board*, 11 Bush, 135; *Hughes v. Coleman*, 10 Bush, 246; *Jett v. Rogers*, 12 Bush, 564; *Martin v. Davidson's Heirs*, 3 Bush, 572; *McCormack v. Woods*, 14 Bush, 78; *Gill v. Fauntleroy's Heirs*, 8 Mon. B. 177; *Blackburn's Heirs v. Pennington*, 8 Mon. B. 47; *Steele v. Lewis*, 1 Mon. 49; *Pendergast v. Gwathmey*, 2 Marsh. A. K. 67; *Whitaker v. Blair*, 3 Marsh. J. J. 236; *Elliott v. Peirsol*, 1 Peters, 328. See *Hawes v. Mann*, 8 Biss. 21. But such a deed may vest the equitable title in her: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319.

² *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Youse v. Norcoms*, 12 Mo. 549; *Hoyt v. Swar*, 53 Ill. 134; *Sandford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773; *Crooks v. Crooks*, 34 Ohio St. 610; *Fowler v. Trebein*, 16 Ohio St. 493; 91 Am. Dec. 95; *Maxwell v. Grace*, 85 Ala. 577; *Ransom v. Ransom*, 30 Mich. 328; *Dempsey v. Tyler*, 3 Duer, 73; *Dean v. Metropolitan Ry. Co.*, 119 N. Y. 540; *Powe v. McLeod*, 76 Ala. 418; *Gaston v. Weir*, 84 Ala. 193; *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46; *Meyer v. Sulzbacher*, 75 Ala. 423; *McMillan v. Peacock*, 57 Ala. 127; *Trustees v. Bryson*, 34 S. C. 401; *Savage v. Savage*, 80 Me. 472; *Johnson v. Stillings*, 35 Me. 427; *Allen v. Hooper*, 50 Me. 371; *Waterman v. Higgins*, 28 Fla. 660; *Putnam v. Bicknell*, 18 Wis. 333; *Albright v. Albright*, 70 Wis. 528; *Kinney v. Dexter*, 81 Wis. 80; *Coates v. Gerlach*, 44 Pa. St.

§ 108. **Deed from husband to wife.**—At common law, distinguished from equity, a conveyance from a husband to his wife directly and without the intervention of a trustee, is void.¹ Equity, however, will give effect to deeds of this character if no fraud is thereby committed upon creditors when made through the intervention of a trustee.² Effect will likewise be given by equity to the conveyance if it is made by force of the statute of uses,

43; *Stickney v. Borman*, 2 Pa. St. 67; *Preston v. Fryer*, 38 Md. 221; *Wilder v. Brooks*, 10 Minn. 50; 88 Am. Dec. 49; *Miller v. Miller*, 17 Or. 423; *Bangert v. Bangert*, 13 Mo. App. 144; *Cooper v. Stanley*, 40 Mo. App. 138; *Crawford v. Whitmore*, 125 Mo. 144; *Warlick v. White*, 86 N. C. 139; 41 Am. Rep. 453; *Ratcliffe v. Dougherty*, 24 Miss. 181; *Wells v. Wells*, 35 Miss. 638. But see *Caho v. Endress*, 8 Cent. L. J. 178.

¹ *Underhill v. Morgan*, 33 Conn. 107; *Rowe v. Hamilton*, 3 Greenl. 63; *Martin v. Martin*, 1 Greenl. 394; *Voorhees v. Presb. Church*, 17 Barb. 103; *Sims v. Rickets*, 35 Ind. 181; 9 Am. Rep. 679; *Shepard v. Shepard*, 7 Johns. Ch. 57; 11 Am. Dec. 396. See *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *McC Campbell v. McC Campbell*, 2 Lea (Tenn.), 661; 31 Am. Rep. 623; *Huber v. Huber*, 10 Ohio, 371; *Dale v. Lincoln*, 62 Ill. 22; *Phelps v. Phelps*, 20 Pick. 556; *Wood v. Broadley*, 76 Mo. 23; 43 Am. Rep. 754; *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319; *Pitts v. Sheriff*, 108 Mo. 110; *Crawford v. Whitmore*, 120 Mo. 144; *Small v. Field*, 102 Mo. 104; *Cardell v. Ryder*, 35 Vt. 47; *Barron v. Barron*, 24 Vt. 375; *Turner v. Kelly*, 70 Ala. 85; *Dyer v. Bean*, 15 Ark. 519; *Brookbank v. Kennard*, 41 Ind. 339; *Thompson v. Mills*, 39 Ind. 528; *Craig v. Chandler*, 6 Col. 543; *Tallinger v. Mandeville*, 113 N. Y. 432; *Hannan v. Oxley*, 23 Wis. 519; *Kinney v. Dexter*, 81 Wis. 80; *Carpenter v. Tatro*, 36 Wis. 297; *Vought v. Vought*, 50 N. J. Eq. 177; *Smith v. Dean*, 15 Neb. 432; *Furrow v. Athey*, 21 Neb. 671; 59 Am. Rep. 867; *Barrows v. Keene*, 15 R. I. 484; *Deming v. Williams*, 26 Conn. 226; 68 Am. Dec. 386; *Bohannon v. Travis*, 94 Ky. 59; *Maraman v. Maraman*, 4 Met. (Ky.) 84; *Warren v. Brown*, 25 Miss. 66; 57 Am. Dec. 191; *Wells v. Wells*, 35 Miss. 638; *Wells v. Treadwell*, 28 Miss. 717; *Sayers v. Wall*, 26 Gratt. 354; 21 Am. Rep. 303; *Jones v. Obenchain*, 10 Gratt. 259; *Chadbourne v. Gilman*, 64 N. H. 353; *Jewell v. Porter*, 31 N. H. 34; *Humphrey v. Spencer*, 36 W. Va. 11; *Story v. Marshall*, 24 Tex. 305; 76 Am. Dec. 106.

² *Spencer v. Godwin*, 30 Ala. 355; *Jewell v. Porter*, 31 N. H. 34; *Slanning v. Style*, 3 P. Wms. 334, where Lord Talbot said that courts of equity have taken notice of and permitted wives to have separate interests by their husband's agreement, especially where the rights of creditors did not interfere: *Frissel v. Rozier*, 19 Mo. 448; *Fowler v. Trebein*, 16 Ohio St. 493; 91 Am. Dec. 95; *Bancroft v. Curtis*, 108 Mass. 47; *Abbott v. Hurd*, 7 Blackf. 510; *Simmons v. Thomas*, 43 Miss. 31; 5 Am. Rep. 470; *Barnum v. Farthing*, 40 How. Pr. 25; *Aultman v. Obermeyer*, 6 Neb. 260; *Loomis v. Brush*, 36 Mich. 40; *Shepard v. Shepard*, 7 Johns. Ch. 57; 11 Am. Dec. 396. And see *Clarke v. McGeihan*, 25 N. J. Eq. 423;

in the form of a deed to the use of the husband or wife,¹ or of a covenant to stand seised.² The agreement of the husband to hold the property as the trustee of the wife should be shown by satisfactory evidence.³ Where a father conveyed land to his daughter and her husband, intending it as an advancement or gift to the daughter, it was held in Pennsylvania that no estate vested in the husband except as a trustee for his wife.⁴ If a gift between the parties is reasonable and not inconsistent with the condition and circumstances of the parties, it will be sustained in equity.⁵ But it has been held that if the transfer is extravagant and exhaustive of the means of the parties, and may be said to be unreasonable, effect will not be given to it.⁶ In several of the States a husband may transfer land to his wife directly, without the aid of a trustee;⁷ and such conveyances will be upheld if supported by a valid consideration,⁸ and made for her separate use.⁹ But they will be invalid if made in fraud of creditors.¹⁰

Moyse v. Gyles, 2 Vern. 385; *Prec. Ch.* 124; *Beard v. Beard*, 3 Atk. 72; *Lady Arundel v. Phipps*, 10 Ves. 146, 149; *Lucas v. Lucas*, 1 Atk. 270.

¹ *Pennsylvania Salt Co. v. Neel*, 54 Pa. St. 9.

² *Thatcher v. Omans*, 3 Pick. 521.

³ *Walter v. Hodge*, 2 Swanst. 107; *McLean v. Langland*, 5 Ves. 79. If a husband conveys land to his wife at her solicitation by reason of his confidence in her as his wife, and for the purpose of relieving her anxiety and providing her with a means of support in case of his death, and she abandons him without cause, he may secure a reconveyance of the property: *Dickerson v. Dickerson*, 24 Neb. 530; 8 Am. St. Rep. 213.

⁴ *Barncord v. Kuhn*, 36 Pa. 383.

⁵ *Townshend v. Townshend*, 1 Abb. N. C. 81; *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *Walter v. Hodge*, 2 Swanst. 106, 107; *Graham v. Londonderry*, 3 Swanst. 393, 395; *Wilson v. Peck*, *Prec. Ch.* 295, 297.

⁶ *Beard v. Beard*, 1 Atk. 72. See *Adlard v. Adlard*, 65 Ill. 212.

⁷ *Burdeno v. Amperse*, 14 Mich. 91; 90 Am. Dec. 225; *Hoffman v. Stigers*, 28 Iowa, 308; *Allen v. Hooper*, 50 Me. 372; *Johnson v. Stillings*, 35 Me. 427; *Wilder v. Brooks*, 10 Minn. 50; 88 Am. Dec. 49; *Winans v. Peebles*, 31 Barb. 371. But see *contra*, *Winans v. Peebles*, 32 N. Y. 423; *White v. Wager*, 25 N. Y. 328.

⁸ *Dale v. Lincoln*, 62 Ill. 22; *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *Watson v. Reskamire*, 45 Iowa, 231.

⁹ *Sims v. Rickets*, 35 Ind. 181; *Thompson v. Mills*, 39 Ind. 528.

¹⁰ *Brookbank v. Kennard*, 41 Ind. 339; *Sherman v. Hogland*, 54 Ind. 578; *Annin v. Annin*, 24 N. J. Eq. 185.

§ 109. **Joint tenants and tenants in common.**—One tenant cannot without the consent of his cotenants select a part of the common estate by metes and bounds, and convey it so as to bind his cotenants.¹ But a conveyance of this character is void only against his cotenants. It is effectual against all others, as they would have no right to complain.² “Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estates. This is the settled law, and hence a conveyance by one tenant of a parcel of a general tract owned by several is inoperative to impair any of the rights of his cotenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular portion of the general tract; as upon a partition which may be claimed by the cotenants at any time, the parcel may be entirely set apart in severalty to a cotenant. He cannot defeat this possible result whilst retaining his interest, nor can he defeat it by the transfer of his interest. He cannot, of course, invest his grantee with rights greater than he possesses. The grantee must take, therefore, subject to the contin-

¹ *Laraway v. Larue*, 63 Iowa, 407; *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22; *Bartlett v. Harlow*, 12 Mass. 348; 7 Am. Dec. 76; *Baldwin v. Whiting*, 13 Mass. 57; *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133; *Rising v. Stannard*, 17 Mass. 282; *Peabody v. Minot*, 24 Pick. 329; *Holcomb v. Coryell*, 11 N. J. 548; *Nichols v. Smith*, 24 Pick. 316; *Griswold v. Johnson*, 5 Conn. 363; *Duncan v. Sylvester*, 24 Me. 482; 41 Am. Dec. 400; *Staniford v. Fullerton*, 18 Me. 229; *Robinett v. Preston*, 2 Rob. (Va.) 278; *Varnum v. Abbott*, 12 Mass. 474; 7 Am. Dec. 87; *Farr v. Reilly*, 58 Iowa, 399.

² *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 163; *Blossom v. Brightman*, 21 Pick. 284; *Phillips v. Tudor*, 10 Gray, 78; 69 Am. Dec. 306; *Sneed's Heirs v. Waring*, 2 Mon. B. 522; *Lamb v. Wakefield*, 1 Sawy. 252; *Good v. Coombs*, 28 Tex. 51; *McKey v. Welch*, 22 Tex. 390; *Butler v. Roys*, 25 Mich. 53. 12 Am. Rep. 218; *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133; *Jewett v. Stockton*, 3 Yerg. 492; *Bigelow v. Topliff*, 25 Vt. 273; 60 Am. Dec. 264; *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139; *Ballou v. Hale*, 47 N. H. 347; 93 Am. Dec. 438; *The Boston Franklinite v. Condit*, 19 N. J. Eq. 394; *March v. Huyter*, 50 Tex. 243. There may be a ratification and partition by consent: *Gordon v. City of San Diego*, 108 Cal. 264.

gency of the loss of the premises, if on the partition of the general tract they should not be allotted to the grantor. Subject to this contingency the conveyance is valid, and passes the interest of the grantor."¹

§ 110. **Deeds by partners.**—In the case of a partnership a deed executed in the firm name by one of the partners will only operate upon his own interest, and cannot affect the interest of his partner.² The general rule is that a partner has no implied power, by virtue of his relation, to bind the firm by an instrument under seal.³ But if express authority has been given for the execution of such a deed, or if there is a subsequent ratification of it, the deed will be effectual.⁴ Thus, where a

¹ *Stark v. Barrett*, 15 Cal. 361, 368, per Field, C. J. Though one tenant cannot alienate by metes and bounds a specific portion of a tract of land held in common, so as to prejudice his cotenants, yet where separate and distinct parcels of land are held by several persons in common, one of them, it has been held, may convey all his undivided interest in the whole of any of the separate parcels, and his deed will be effectual against his cotenants: *Primm v. Walker*, 38 Mo. 94. See *Bell v. Adams*, 81 N. C. 118; *Reinicker v. Smith*, 2 Har. & J. 421; *Treon v. Emerick*, 6 Ohio, 391; *Barnhart v. Campbell*, 50 Mo. 597; *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22. Cotenants may treat as void a conveyance by one tenant, of a portion of land held in common, by metes and bounds, even when the tract is composed of separate parcels: *Barnes v. Lynch*, 151 Mass. 510; 21 Am. St. Rep. 470. When a tenant in common conveys any but an undivided interest, his deed, while void as to the other cotenants, may be considered in partition so as to protect the rights and secure the interest of the purchaser: *Benedict v. Torrent*, 83 Mich. 181; 21 Am. St. Rep. 589.

² *Thompson v. Bowman*, 6 Wall. 316; *Brooks v. Sullivan*, 32 Wis. 444; *Layton v. Hastings*, 2 Har. 147; *Jackson v. Stanford*, 19 Ga. 14; *Anderson v. Tompkins*, 1 Brock. 456.

³ *Clement v. Brush*, 3 Johns. Cas. 180; *Doe v. Tupper*, 4 Smedes & M. 261; 43 Am. Dec. 483; *Harrison v. Jackson*, 7 Term Rep. 207; *Van Deusen v. Blum*, 18 Pick. 229; 29 Am. Dec. 582; *Minnely v. Doherty*, 1 Yerg. 26; *Posey v. Bullitt*, 1 Blackf. 99; *Trimble v. Coons*, 2 Marsh. A. K. 375; 12 Am. Dec. 411; *Little v. Hazard*, 5 Har. 292; *Snodgrass' Appeal*, 13 Pa. St. 471; *Morris v. Jones*, 4 Har. 428; *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731; *Cummins v. Cassily*, 5 Mon. B. 74.

⁴ *Gunter v. Williams*, 40 Ala. 561; *Shirley v. Fearne*, 33 Miss. 653; 69 Am. Dec. 375; *Gibson v. Warden*, 14 Wall. 244; *Ely v. Hair*, 16 Mon. B. 230; *Baldwin v. Richardson*, 33 Tex. 16; 1 Am. Lead. Cas. 592; *Lowery*

deed is executed by one partner, with the consent of the others, and in their presence, it will be treated as the deed of all.¹

§ 111. **Subsequent ratification.**—But in cases where it has been claimed that the deed has been rendered effectual by a subsequent ratification, it has been extremely difficult to determine the nature of the act by which this fact should be manifested. Naturally, the decisions will be found more or less inharmonious. The particular circumstances of each case must, in the main, govern, when it is urged that sufficient assent has been given to a prior unauthorized conveyance to make it operative. The English decisions are to the effect that a subsequent ratification to effectuate a deed executed by a partner without previous authority must be under seal.² But the general American rule is, that a parol ratification is sufficient to make such a deed the deed of the firm.³ And there is authority to the effect that an express ratifi-

v. Drew, 18 Tex. 786; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *Haynes v. Seachrest*, 13 Iowa, 455.

¹ Story on Partnership, § 120; *Ball v. Dunsterville*, 4 Term Rep. 313; *Burn v. Burn*, 3 Ves. 573; *Mackay v. Bloodgood*, 9 Johns. 285; *Halsey v. Whitney*, 4 Mason, 206. See *Smith v. Winter*, 4 Mees. & W. 454; *Hunter v. Parker*, 7 Mees. & W. 322; *Potter v. McCoy*, 26 Pa. St. 458; *Anthony v. Butler*, 13 Peters, 423.

² Gow on Partnership, ch. 2, § 2, pp. 58-6) (3d ed.); *Steiglitz v. Eggington*, Holt N. P. 141; *Hunter v. Parker*, 7 Mees. & W. 322, 342; *Wallace v. Kelsall*, 7 Mees. & W. 264, 272; Story on Partnership, § 121. See *Henry County v. Gates*, 26 Mo. 315; *Snyder v. May*, 19 Pa. St. 235.

³ *Cady v. Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *Bond v. Aitkin*, 6 Watts & S. 165; 40 Am. Dec. 550; *Grady v. Robinson*, 28 Ala. 289; *Gunter v. Williams*, 40 Ala. 561; *Hayes v. Seachrest*, 13 Iowa, 455; *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Gram v. Seton*, 1 Hall, 262; *Smith v. Kerr*, 3 Comst. 144; *Johns v. Battin*, 30 Pa. St. 84; *McDonald v. Eggleston*, 26 Vt. 154; 60 Am. Dec. 303; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Swan v. Stedman*, 4 Met. 548; *Willey v. Lines*, 3 Houst. 542; *Russell v. Annable*, 109 Mass. 72; 12 Am. Rep. 665; *Holbrook v. Chamberlin*, 116 Mass. 155; 17 Am. Rep. 146; *Gibson v. Warden*, 14 Wall. 244. See also *Cunningham v. Lamar*, 51 Ga. 574; *Mann v. Etna Ins. Co.*, 40 Wis. 549; *Kasson v. Bocker*, 47 Wis. 79; *Williams v. Gillies*, 75 N. Y. 197; *Hawkins v. First National Bank of Hastings*, 1 Dill. 462.

cation is not necessary; that it may be by the conduct and course of dealing pursued by the firm.¹

§ 112. **Deed by a disseisee.**—The old rule of the common law was that a person out of possession was unable to make a valid transfer of his property. This proceeded on the ground that rights which had not been reduced to possession could not be assigned to a stranger; because it was assumed that such a transfer had a tendency to produce litigation. Statutes have been enacted in several of the States providing against the conveyance of pretended titles.² In States where statutes of this character exist, a deed made by a party who is out of possession, and against whom the land he seeks to convey is held adversely by another under a claim of title, is ineffectual to transfer the legal title against the person having the actual seisin.³ Thus in Massachusetts, this rule was enforced where the grantor was out of possession for only four months.⁴

§ 113. **Right of seisin.**—But a deed made by a disseisee is not void as a contract between the parties to the conveyance. But it is void to the extent that it will not pass the legal title and seisin, nor enable the grantee to maintain an action in his own name against the party who has the actual seisin.⁵ By the execution of a deed

¹ *Gwinn v. Rooker*, 24 Me. 292; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *Hatch v. Crawford*, 2 Port. 54; *Davis v. Burton*, 3 Scam. 41; 36 Am. Dec. 511; *Witter v. McNeil*, 3 Scam. 433. See *Catlin v. Gilder*, 3 Ala. 536; *Kelley v. Pike*, 5 Cush. 484; *Haynes v. Seachrest*, 13 Iowa, 455.

² *Jackson v. Ketchum*, 8 Johns. 479; *Jackson v. Andrews*, 7 Wend. 152; 22 Am. Dec. 574; *Murray v. Ballow*, 1 Johns. Ch. 573; *Ludlow v. Kidd*, 3 Ohio, 541. See *Roberts v. Cooper*, 20 How. 467.

³ *Thurman v. Cameron*, 24 Wend. 87; *Loud v. Darling*, 7 Allen, 205; *Way v. Arnold*, 18 Ga. 181; *Burdick v. Burdick*, 14 R. I. 574; *Dame v. Wingate*, 12 N. H. 291; *Johnson v. Cook*, 73 Ala. 537; *Bernstein v. Humes*, 75 Ala. 241.

⁴ *Sohier v. Coffin*, 101 Mass. 179. And so in Georgia: *Jones v. Munroe*, 32 Ga. 188.

⁵ *Farnum v. Peterson*, 111 Mass. 151. See *McMahan v. Bowe*, 114 Mass. 140; 19 Am. Rep. 321; *Snow v. Orleans*, 126 Mass. 453. A tenant at will is not considered a disseisor: *Alexander v. Carew*, 13 Allen, 72.

under such circumstances the grantor does not divest himself of his right of seisin, and he may maintain an action in his own name for the recovery of the land, the title to the land being considered as unaffected by the transaction.¹ But a good title may be passed, if the grantor who is out of possession enters upon the land and delivers the deed upon it.² In Indiana, a deed made by a disseisee has no force against the party in possession. This does not rest upon the ground of champerty or maintenance, but of uniformly observed usage.³ In Vermont, a deed by a disseisee is valid in equity and between the parties, but inoperative against strangers.⁴ If the disseisee enters under a deed which is void, and he has knowledge of this fact, it is held that his actual possession and occupation are the extent of the disseisin of the owner; but if he believes that the deed under which he enters conveys the title, he is considered as in the possession of all the land described in the deed, and the owner is unable to convey until he has by entry acquired his possession again.⁵ This rule with reference to the deed of a disseisee has been held to be operative in Kentucky, Indiana, Vermont, New York, North Carolina, Massachusetts, Mississippi, Georgia, Michigan, New Hampshire, and Connecticut.⁶ Where there is no intention to inter-

¹ *Brinley v. Whiting*, 5 Pick. 348, 355; *Loud v. Darling*, 7 Allen, 206; *Shortall v. Hinckley*, 31 Ill. 219; *Barry v. Adams*, 3 Allen, 493; *Kincaid v. Meadows*, 3 Head, 192; *Sohier v. Coffin*, 101 Mass. 179.

² *Farwell v. Rogers*, 99 Mass. 36.

³ *Webb v. Thompson*, 23 Ind. 432; *German Ins. Co. v. Grim*, 32 Ind. 257; 2 Am. Rep. 341.

⁴ *Park v. Pratt*, 38 Vt. 553; *White v. Fuller*, 38 Vt. 204.

⁵ *Livingston v. Peru Co.*, 9 Wend. 511, 522, 523; *Moore v. Worley*, 24 Ind. 83.

⁶ *Hoyle v. Logan*, 4 Dev. 495; *Thurman v. Cameron*, 24 Wend. 87; *Gresham v. Webb*, 29 Ga. 320; *Den v. Shearer*, 1 Murph. 114; *Hathorne v. Haines*, 1 Me. 238; *Ewing v. Savary*, 4 Bibb. 424; *Helms v. May*, 29 Ga. 121; *Betsey v. Torrance*, 34 Miss. 132; *Parker v. Proprietors etc.*, 3 Met. 98; 37 Am. Dec. 121; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Wade v. Lindsey*, 6 Met. 407, 414; *Selleck v. Starr*, 6 Vt. 194; *Foxcroft v. Barnes*, 29 Me. 128; *Granger v. Swart*, 1 Woolw. 91; *Harral v. Levery*, 50 Conn. 46; 47 Am. Rep. 608.

fere with the rights of the rightful owner, as in the case of an occupation under a mistake as to the dividing line between two adjacent owners, the mere fact that the grantor is out of possession does not render his deed void.¹ While the deed would be ineffectual against the party holding adversely at the time of its execution, and those claiming under him, it would to everybody else be valid and free from objection.² This state cannot be deprived of its right to convey lands from the fact that they are occupied adversely, for the state cannot be disseised.³ A deed will be effectual to pass the owner's title, although the land conveyed may be held by another in adverse possession, in Michigan, South Carolina, Pennsylvania, Illinois, Maine, Ohio, and Wisconsin.⁴ In California, the rule is that "any person claiming title to real property in the adverse possession of another, may transfer it with the same effect as if in actual possession."⁵ In Con-

¹ *Sparhawk v. Bagg*, 16 Gray, 585; *Cleaveland v. Flagg*, 4 Cush. 76. Though the title remains in the grantor he is a trustee for the grantee, and the latter may sue in the grantor's name for possession: *Betsey v. Torrance*, 34 Miss. 138, 139; *Wade v. Lindsey*, 6 Met. 413, 414; *Edwards v. Parkhurst*, 21 Vt. 472; *Culver v. Avery*, 7 Wend. 380; 22 Am. Dec. 586; *Stockton v. Williams*, 1 Doug. (Mich.) 547; *Wilson v. Nance*, 11 Humph. 191; *Livingston v. Peru Iron Co.*, 9 Wend. 523.

² *Edwards v. Roys*, 18 Vt. 473; *Livingston v. Peru Iron Co.*, 9 Wend. 511; *University of Vermont v. Joslyn*, 21 Vt. 61; *White v. Fuller*, 38 Vt. 204; *Betsey v. Torrance*, 34 Miss. 138; *Farnum v. Peterson*, 111 Mass. 151; *Livingston v. Proseus*, 2 Hill, 526; *Wade v. Lindsey*, 6 Met. 407; *Stockton v. Williams*, 1 Doug. (Mich.) 547; *Park v. Pratt*, 38 Vt. 553. But see *Steeple v. Downing*, 60 Ind. 484; *Brinley v. Whiting*, 5 Pick. 348; *Tabb v. Baird*, 3 Call, 475; *Gibson v. Shearer*, 1 Murph. 114.

³ *Ward v. Bartholomew*, 6 Pick. 409; *People v. Mayor*, 28 Barb. 240. Nor can such possession have the effect of impairing the validity of a sale by or under an order of court, or by a public officer acting as such: *Jarrett v. Tomlinson*, 4 Watts & S. 114; *Hanna v. Renfro*, 32 Miss. 130; *Frizzle v. Veach*, 1 Dana, 211, 216.

⁴ *Crane v. Reeder*, 21 Mich. 24; 4 Am. Rep. 430; *Poyas v. Wilkins*, 12 Rich. 420; *Cresson v. Miller*, 2 Watts, 272; *Shortall v. Hinckley*, 31 Ill. 219; *Fetrow v. Merriweather*, 53 Ill. 279; Me. Rev. Stats., ch. 73, § 1; *Hall v. Ashby*, 9 Ohio, 96; 34 Am. Dec. 424; *Bennet v. Williams*, 5 Ohio, 461; *Stewart v. McSweeney*, 14 Wis. 471.

⁵ Civ. Code, § 1047. It was held in California that a good consideration for a promissory note may consist in the sale of information of an

necticut, where a deed made by a grantor who is ousted is void, unless made to a person in possession, a grantor ousted of possession may make a deed to one to whom he had previously contracted to convey it.¹

§ 114. Power of corporations to convey.—Ownership of property implies as an incident the power of alienation. Where a corporation is the owner of property, it possesses this power in common with natural persons, except in so far as statutory provisions or considerations of public policy operate as a restraint upon its exercise.² Thus a corporation which was created for the purpose of owning ditches for the conveyance and sale of water has the power of selling and transferring all its corporate property, if the sale is made for corporate purposes and legitimately; and it may be assumed as against the corporation by strangers purchasing by deed, that the sale was made for a proper purpose.³ And it seems that if the corpora-

outstanding title to land in the adverse possession of another: *Lucas v. Pico*, 55 Cal. 126, 128.

¹ *Harral v. Levery*, 50 Conn. 46; 47 Am. Rep. 608.

² *Angell & Ames on Corporations*, § 187; *White Water Valley Canal Co. v. Vallette*, 21 How. 424. See *Partridge v. Badger*, 25 Barb. 146; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280; *Pierce v. Emery*, 32 N. H. 486; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *U. S. Bank v. Huth*, 4 Mon. B. 423; *Dana v. Bank of United States*, 5 Watts & S. 223; *State v. Bank of Maryland*, 6 Gill. & J. 205; 26 Am. Dec. 561; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; 66 Am. Dec. 490; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Sargent v. Webster*, 13 Met. 497; 46 Am. Dec. 743.

³ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300. The court said: "This corporation was created for the immediate benefit of the stockholders, with no direct specific public purpose in view, as in the case of a railroad or turnpike or canal companies. The only interest the public has in the continuance of the business is the remote general interest which it has in the proper development of the resources of the country. The restrictions placed upon it are for the purpose of giving the public notice of its powers, of confining its business to the line indicated in its certificate, and for protecting the shareholders and parties dealing with it against the usurpation of its officers. The corporation is a distinct individual, holding the legal title to the property in trust for the benefit of the shareholders, who are the beneficiaries having the equitable interest. If it is found from experience that the interest of the incorporators and creditors require that the business should not be carried

tion desires to contest the validity of a sale of this character on the ground that it was made for an unlawful purpose, the burden of proving that the purchaser knew of such unlawful purpose rests upon it.¹ Where a corporation, organized for the purpose of creating water power, cannot use its privileges with profit to itself in the future, it may sell its real estate and take its own stock in payment.²

§ 115. Restriction from nature of corporation.—The power of alienation, may, however, be restricted by the nature of the corporation or by the character of the objects for which it was organized, although the charter contain no limitation upon its power to convey.³ "Corporations for public objects, to which large powers are given to en-

on upon so large a scale, or that it should cease entirely, and the disposal and conveyance of a part or the whole of the property is necessary to a reduction or cessation of the business, and the stockholders consent or do not object, we know of nothing in the statute or in sound public policy to prevent the sale or conveyance for such purpose. The state can have no interest in compelling its citizens or corporations to carry on business of any kind at a loss. No sound public policy can drive corporations or private individuals to insolvency."

¹ *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300.

² *Dupee v. Boston Water Power Co.*, 114 Mass. 37. In *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393, 66 Am. Dec. 490, it was said with reference to commercial corporations: "Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on business for which they are incorporated indefinitely and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interests of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority." See, also, *Sargent v. Webster*, 13 Met. 498; 46 Am. Dec. 743; *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Reynolds v. Commissioners*, 5 Ohio, 205.

³ *Richards v. Railroad*, 44 N. H. 136.

able them to accommodate the public, and upon which public duties are imposed for the benefit of the community, are held in England and in this State to be disabled to do any act which would amount to a renunciation of their duty to the public, or which directly and necessarily disables them from performing it." A donation of all the property of an incorporated secret society, by a resolution of a majority of its members to another corporation of which the majority are members, is invalid.²

PART II.

WHO MAY TAKE BY DEED.

§ 116. **The capacity of the grantee.**—Persons who, from some legal disability, are unable to make a valid deed, yet frequently may take as grantees. The capacity of a grantee is less restricted than that of a grantor. Thus, married women, infants, and persons *non compos mentis* may take as grantees.³ Deeds made to a person of non-sane mind,⁴ or to an infant, are voidable.⁵ A wife may take as grantee at common law without her husband's

¹ Bell, C. J., in *Richard v. Railroad*, 44 N. H. 136. See, as to railroad companies, *Singleton v. Southwestern R. R.*, 70 Ga. 464; 48 Am. Rep. 574; *Thomas v. Railroad Co.*, 101 U. S. 71; *Tippecanoe Co. v. Lafayette etc. R. R. Co.*, 50 Ind. 85; *Richards v. Merrimack etc. R. R.*, 44 N. H. 127; *McAllister v. Plant*, 54 Miss. 106; *Atlantic & Pac. Tel. Co. v. Union Pac. R. R. Co.*, 1 McCreary, 541; *Hays v. Ottawa etc. R. R. Co.*, 61 Ill. 422; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; 66 Am. Dec. 490; *Naglee v. Alexandria & T. Ry. Co.*, 83 Va. 707; 5 Am. St. Rep. 308; *Russell v. Texas & P. Ry. Co.*, 68 Tex. 646; *Stewart's Appeal*, 56 Pa. St. 413; *Penn Co. v. St. Louis etc. R. R. Co.*, 118 U. S. 290; *Branch v. Jessup*, 106 U. S. 468; *Middlesex etc. R. R. Co. v. Boston etc. R. R. Co.*, 115 Mass. 347; *State v. Consolidation Coal Co.*, 46 Md. 1; *Gulf etc. Ry. Co. v. Morris*, 67 Tex. 692.

² *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53.

³ Wood on Conveyancing, §§ 165, 168; Perkins, § 51; Co. Litt. 2b, 3b; 3 Wash. Real Prop. § 267. See *First Parish in Sutton v. Cole*, 3 Pick. 232; *Concord Bank v. Bellis*, 10 Cush. 278. See *Suñol v. Hepburn*, 1 Cal. 254.

⁴ Bishop on Contracts, § 296.

⁵ *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429; *Griffith v. Schwen-derman*, 27 Mo. 412.

consent, and, unless the husband avoided the conveyance by some act which declared his dissent, the deed would be good. The wife, however, might, after her husband's death, waive or disagree to the purchase.¹ But at the present time, in nearly all of the States, a conveyance may be made to the wife over which the husband will have no control; and the conveyance may, in some instances, be made to her directly, and in others by the aid of a trustee for her sole and separate use.² But if a deed is made to a married woman in which she is not described as such, and which does not purport to be for her sole and separate use, the presumption is that it is a deed to the husband and wife in common. The burden of proof is, therefore, upon the wife to establish the fact that the property so acquired is her separate property;³ that is, purchased with her own money for that purpose.⁴

§ 117. Deeds to husband and wife.—At common law, where an estate in fee was conveyed to a man and his wife, they were held to be neither joint tenants nor ten-

¹ 2 Blackst. Com. § 292; 2 Kent's Com. § 150; 1 Bishop on Married Women, § 35; *Baxter v. Smith*, 6 Binn. 427; *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344.

² *Meyer v. Kinzer*, 12 Cal. 251; 73 Am. Dec. 538; *Bayer v. Cockerill*, 3 Can. 282; *Huston v. Curl*, 8 Tex. 240; 58 Am. Dec. 110; *Commonwealth v. Williams*, 7 Gray, 337; *Ayer v. Ayer*, 16 Pick. 331; *Fisk v. Stubbs*, 30 Ala. 335; *Pooley v. Webb*, 3 Cold. 599; *Nightingale v. Hidden*, 7 R. I. 128; *Gamber v. Gamber*, 6 Har. (Pa.) 363; *McVey v. Green Bay R. R. Co.*, 42 Wis. 532; *Whitehead v. Arline*, 43 Ga. 221; *Burnley v. Thomas*, 63 Mo. 390; *Lippincott v. Mitchell*, 94 U. S. 767; *Vance v. Nogle*, 70 Pa. St. 176; *Smalley v. Lawrence*, 9 Rob. (La.) 211; *Richmond v. Tibbles*, 26 Iowa, 474; *Uhrig v. Horstman*, 8 Bush, 172; *Prout v. Roby*, 15 Wall. 471.

³ *Adams v. Knowlton*, 22 Cal. 283; *Merrill v. Bullock*, 105 Mass. 486; *Reeves v. Webster*, 71 Ill. 307. See *Hayt v. Parks*, 39 Conn. 357; *Hussey v. Castle*, 41 Cal. 239; *Denechaud v. Berrey*, 48 Ala. 591. In *Hussey v. Castle*, *supra*, it was held that there was no legal presumption that land, the separate property of the husband, conveyed by him to the wife for money, the separate property of the wife, became after such transfer the community property of the husband and wife.

⁴ *Pettit v. Fretz*, 33 Pa. St. 120; *Commonwealth v. Williams*, 7 Gray, 367. See *Nightingale v. Hidden*, 7 R. I. 131; *Woodford v. Stephens*, 51 Mo. 443; *Lyon v. Green Bay R. R. Co.*, 42 Wis. 543.

ants in common. Considered as one person in law, they could not take the estate by moieties.¹ Where, therefore, an estate was granted to a husband and wife and a third person, the husband and wife had one moiety, and the third person the other.² The early decisions in New York are to the effect that husband and wife hold lands conveyed to them by entireties, and not as joint tenants or tenants in common. The husband is entitled to the possession during their joint lives, but upon the death of one the whole estate vests in the survivor.³ The statute, however, in New York provides that where an estate is granted or devised to two or more persons, it shall be deemed a tenancy in common, unless there is an express declaration that it shall be held in joint tenancy.⁴ But if the conveyance expressly declared that they should hold as joint tenants they would do so.⁵ But lately the opinion was expressed that where a deed was made to husband and wife jointly, they would, in the absence of a statement in the conveyance as to the estate they should take, be tenants in common.⁶ But more recently it has been decided by the court of appeals of that state that the com-

¹ 2 Blackst. Com. 182.

² Litt. § 291. But if an estate had been conveyed to a man and woman who, at the time of the conveyance, were not married to each other, but subsequently intermarried, they took by moieties and held by moieties after marriage: *Moody v. Moody*, Amb. 649.

³ *Torrey v. Torrey*, 14 N. Y. 430; *Wright v. Sadler*, 20 N. Y. 320; *Dias v. Glover*, Hoff. Ch. 71; *Jackson v. Stevens*, 16 Johns. 110; *Beach v. Hollister*, 3 Hun, 519; *Baker v. Lamb*, 11 Hun, 519; *Dickinson v. Codwise*, 1 Sand. Ch. 214; *Freeman v. Barber*, 3 N. Y. S. C. (Thomp. & C.) 573; *Goelet v. Gori*, 31 Barb. 314; *Farmers' & Mechanics' Nat. Bank v. Gregory*, 49 Barb. 155, 162; *Rogers v. Benson*, 5 Johns. 431; *Miller v. Miller*, 9 Abb. Pr., N. S., 444; *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Doe v. Howland*, 8 Cowen, 277; 18 Am. Dec. 445.

⁴ 1 Rev. Stats. 727, § 44; 1 U. S. Stats. 676.

⁵ See *Hicks v. Cochran*, 4 Edw. Ch. 107; *Stewart v. Patrick*, 68 N. Y. 450.

⁶ *Meeker v. Wright*, 76 N. Y. 262. This opinion was concurred in by three of the judges, but the other four concurred in the decision of the case upon another point, without expressing any opinion upon this question: See *Zorntlein v. Bram*, 63 How. Pr. 240.

mon-law doctrine has never been abrogated, and that husband and wife take as tenants by entirety, and not as tenants in common or joint tenants. This decision overrules the decisions just noticed.¹

§ 118. **Other States.**—In Massachusetts, although by statute it is provided that where conveyances are made to two or more persons, they shall, if nothing appear in the instrument to the contrary, be deemed tenants in common, yet it has been decided that this provision does not apply to conveyances to husband and wife; they are considered in law as one person, and the survivor is en-

¹ *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361. Earl, J., in delivering the opinion of the court, said: "It is said that the reason upon which the common-law rule under consideration was based has ceased to exist, and hence that the rule should be held to disappear. It is impossible now to determine how the rule, in the remote past, obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist, or is not discernible, and yet on that account courts are not authorized to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded upon no reason, or upon reasons that have ceased to operate. It was never, we believe, regarded as a mischief, that under a conveyance to husband and wife they should take as tenants by the entirety, and we have no reason to believe that it was within the contemplation of the legislature to change that rule. Neither do we think that there is any public policy which requires that the statute should be so construed as to change the common-law rule. It was never considered that the rule abridged the rights of married women, but rather that it enlarged their rights and improved their condition. It would be against the spirit of the statutes to cut down an estate of the wife by the entirety to an estate as tenant in common with her husband. If the rule is to be changed, it should be changed by a plain act of the legislature, applicable to future conveyances; otherwise incalculable mischief may follow by unsettling and disturbing dispositions of property made upon the faith of the common-law rule. The courts certainly ought not to go faster than the legislature in obliterating rules of law under which many generations have lived and flourished and the best civilization of any age or country has grown up." Danforth, J., and Finch, J., dissented, on the ground that the common-law doctrine was abrogated by the statute enabling a wife to hold a separate estate, and also for the reasons stated in the case of *Meeker v. Wright*, 76 N. Y. 262.

titled to the whole estate. Some of the decisions, however, state that a deed to husband and wife will make them joint tenants; but they also declare that the survivor takes the whole, and a deed by one will not bind the other.¹ In Wisconsin the rule of the common law prevails,² and it is recognized also in Indiana and Missouri.³ This rule was enforced in Indiana, where a conveyance was made to husband and wife without specifying their relation, and to several other grantees.⁴ The doctrine of the common law is observed in Maine,⁵ and in Vermont.⁶ In New Hampshire, the doctrine of tenancies by entirety has been abrogated by statute.⁷ In Connecticut, the husband and wife become joint tenants, and the husband has the power of conveying his interest.⁸ In Pennsylvania, in accordance with the common-law rule, it is held, that by a conveyance of land to husband and wife they take the estate by entirety, and this would be so, although the deed be made to them as "tenants in common, and not as joint tenants."⁹ In Michigan, when a conveyance is made to husband and wife, they take the same estate as they would at common law,¹⁰ although there is a constitutional provi-

¹ *Dutch v. Manning*, 2 Dane's Abr. 230; *Ross v. Garrison*, 1 Dane's Abr. 35; *Shaw v. Hearsey*, 5 Mass. 521-523; *Fox v. Fletcher*, 8 Mass. 274; *Varnum v. Abbot*, 12 Mass. 474; 7 Am. Dec. 87; *Wales v. Coffin*, 13 Allen, 213.

² *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 49; *Bennett v. Child*, 19 Wis. 365; 18 Am. Dec. 632.

³ *Davis v. Clark*, 26 Ind. 428; 89 Am. Dec. 471; *Arnold v. Arnold*, 30 Ind. 305; *Falls v. Horthorn*, 30 Ind. 444; *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577; *Anderson v. Tannehill*, 42 Ind. 141; *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64; *Garner v. Jones*, 52 Mo. 68. See *Gibson v. Zimmerman*, 12 Mo. 385; 51 Am. Dec. 168.

⁴ *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64; *Chandler v. Cheney*, 37 Ind. 391; *Barnes v. Loyd*, 37 Ind. 523.

⁵ *Harding v. Springer*, 14 Me. 407; 31 Am. Dec. 61.

⁶ *Brownson v. Hull*, 16 Vt. 309; 42 Am. Dec. 517.

⁷ *Clark v. Clark*, 56 N. H. 105.

⁸ *Whittlesey v. Fuller*, 11 Conn. 337.

⁹ *Fairchild v. Chastelleux*, 1 Pa. 176; 44 Am. Dec. 117; *Stuckey v. Keefe's Executor*, 26 Pa. 337; *Bates v. Seely*, 46 Pa. 248; *Diver v. Diver*, 56 Pa. 106; *French v. Mehan*, 56 Pa. 289; *McCurdy v. Canning*, 64 Pa. 39.

¹⁰ *Fisher v. Provin*, 25 Mich. 347, 350; *Jacobs v. Miller*, 50 Mich. 119; *Aetna Ins. Co. v. Resh*, 40 Mich. 241; *Manwaring v. Powell*, 40 Mich. 371.

sion for the enjoyment by married women of their property.¹ In New Jersey, the husband and wife held by entirety; but this estate it seems has been abolished by statute.² In Kentucky, it was formerly held that where a conveyance was made to husband and wife, without limitation, they became tenants by the entirety, and the whole estate vested in the survivor.³ But by the Revised Statutes, unless a right of survivorship is expressly provided for in a conveyance to husband and wife, they hold as tenants in common with all the incidents of a tenancy of this nature.⁴ But in Maryland,⁵ Virginia,⁶ and North Carolina⁷ the common law prevails. The husband and wife hold by entirety, and the survivor takes the whole estate; and the law is the same, substantially, in Tennessee.⁸ It is held in Arkansas that the statutes and constitution of that State do not alter the common-law rule upon this subject, and that it is still in force;⁹ and, in Mississippi, an estate by entirety is created by a deed to husband and wife. But the sole debt of the husband may be secured by a joint mortgage executed by husband and wife.¹⁰ In Texas, where a gift is made to husband and

¹ Const. Mich. art. xvi. § 5. A husband and wife may occupy the homestead as tenants in common: *Lozo v. Sutherland*, 38 Mich. 168.

² *Washburn v. Burns*, 34 N. J. L. 18; *Den v. Hardenbergh*, 5 Halst. 42; 18 Am. Dec. 371; *Den v. Gardner*, 1 Spenc. 556; 45 Am. Dec. 388; *Thomas v. De Baum*, 1 McCart. 40; *McDermott v. French*, 2 McCart. 78; *Bolles v. State Trust Co.*, 12 Green, C. E., 308; See *v. Zabriskie*, 1 Stewt. Eq. 423. See *Kip v. Kip*, 33 N. J. Eq. 213; 23 Alb. L. J. 219.

³ *Ross v. Garrison*, 1 Dana, 35; *Rogers v. Grider*, 1 Dana, 243; *Cochran v. Kerney*, 9 Bush, 199; *Babbit v. Scroggin*, 1 Duval, 272.

⁴ 2 Rev. Stats., ch. 47, § 14; *Croan v. Joyce*, 3 Bush, 454; *Elliott v. Nichols*, 4 Bush, 502.

⁵ *Marburg v. Cole*, cited in 22 Alb. L. J. 59; *Hannan v. Towers*, 3 Har. & J. 147; 5 Am. Dec. 427.

⁶ *Thornton v. Thornton*, 3 Rand. 179.

⁷ *Motley v. Whitmore*, 2 Dev. & B. 537; *Needham v. Branson*, 5 Ired. 426; 44 Am. Dec. 45; *Woodford v. Higly*, 1 Winst. 237; *Jones v. Potter*, 89 N. C. 200.

⁸ *Taul v. Campbell*, 7 Yerg. 319; 27 Am. Dec. 508; *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269.

⁹ *Robinson v. Eagle*, 29 Ark. 202.

¹⁰ *McDuff v. Beauchamp*, 50 Miss. 531; *Hemmingway v. Scales*, 42

wife, the wife has an undivided half-interest in the property conveyed as her separate estate.¹ In Michigan, where a deed had been made to a man and woman living together as husband and wife, and regarded as occupying that relation by the public, and he, after her death, conveyed the land, and her children by a former husband sought to claim a right of inheritance in the land by showing that she was not lawfully married to the man, and that the estate taken by them was a tenancy in common, it was held that the grantees became seised of the entirety, the survivor taking the whole, and that they were tenants in common could not be shown by parol.² But even if the property is paid for with funds belonging to the community, still if the deed is made to the sole and separate use of the wife, in pursuance of the common understanding of all parties interested, the object being to vest the title in her, she has the title to the land conveyed as her separate estate.³

§ 119. Husband's name inserted by mistake.—Where the name of the husband has been inserted in the deed as one of the grantees by mistake, a court of equity may correct the mistake. A married woman purchased a piece of land, and the person who drew up the deed inserted the husband's name with hers, thus conveying the title to them jointly. Subsequently, the husband died, and after his death his widow brought an action against the heirs to reform the deed, by striking out the husband's name. The mistake having been satisfactorily shown, the court granted the relief prayed for.⁴

Miss. 1; 97 Am. Dec. 425; 2 Am. Rep. 586. As to origin, see *Myers v. Reed*, 17 Fed. Rep. 401.

¹ *Bradley v. Love*, 60 Tex. 472.

² *Jacobs v. Miller*, 50 Mich. 119.

³ *Baker v. Baker*, 55 Tex. 577; *Morrison v. Clark*, 55 Tex. 437. See *Edwards v. Beall*, 75 Ind. 401.

⁴ *Courtright v. Courtright*, 63 Iowa, 356. See *Nowlin v. Pyne*, 47 Iowa, 293.

§ 120. **Deeds to corporations.**—In England, the right of a corporation to hold land was restrained by statutes, known as statutes of mortmain.¹ In Pennsylvania, the statutes of mortmain have been held to be in force so far as they are consonant with its political condition.² “In other States, it is understood,” says Kent, “that the statutes of mortmain have not been re-enacted or practiced upon.”³ If a charter of a corporation forbids it to purchase or take lands, a deed made to it is void.⁴ But a grantor may be estopped to deny the capacity of the grantee, where he has made a deed to a corporation named as grantee, although due to the attorney’s mistake, the incorporation of the grantee was not completed until after the execution of the deed.⁵ So where a person has conveyed property to a corporation, and has been one of its officers he cannot deny its existence as a corporation *de facto*.⁶ But a deed to a pretended corporation having no real existence is void.⁷

§ 120 a. **Deed to trustees of unincorporated association.**—Where a deed is made to a number of persons, who are described as trustees of an association, it not appearing that the association is incorporated, or capable as such of taking a legal title, it is to be assumed that the association is a partnership of individuals of which the grantees

¹ Co. Litt. 2 b; 1 Blackst. Com. 479; 2 Blackst. Com. 268, 274.

² 3 Binney App. 626. See *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61.

³ 2 Kent’s Com. 229; *McCartee v. Orphan Asylum*, 9 Cowen, 452; 18 Am. Dec. 516; *Potter v. Thornton*, 7 R. I. 252; *Lathrop v. Scioto Com. Bank*, 8 Dana, 119; 33 Am. Dec. 481.

⁴ *Leazure v. Hillegas*, 7 Serg. & R. 319, per Tilghman, C. J.

⁵ *Reinhard v. Virginia etc. Mining Co.*, 107 Mo. 616; 28 Am. St. Rep. 441; *Brodwell v. Merritt*, 87 Mo. 99.

⁶ *Bates v. Wilson etc. Co.*, 14 Col. 141.

⁷ *Douthitt v. Stinson*, 63 Mo. 268. A person who has made a note to a corporation cannot question its existence at the time of the making of the note: *Congregational Society v. Perry*, 6 N. H. 164; 25 Am. Dec. 455; *Jones v. Bank*, 8 B. Mon. 122; 46 Am. Dec. 540. See, also, *Brookville etc. Turnpike Co. v. McCarty*, 8 Ind. 392; 65 Am. Dec. 678; *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415; *Winget v. Quincy etc. Assn.*, 128 Ill. 68.

were members, holding the legal title for the benefit of themselves and others. They are not to be considered mere trustees, holding simply a nominal title. It is immaterial whether such a deed is to be regarded as made to the grantees named individually, or as a conveyance for their benefit, and that of others. In either case the persons named as grantees have authority to sell the property, and to convey a good title.¹

§ 121. Question between State and corporation.—

The general rule is that the State alone can take advantage of the clause in the charter prohibiting a corporation from holding land. In Virginia, it was decided upon a bill by a corporation for the specific performance of a contract to convey lands, that it was no defense that the corporation was by its charter not allowed to hold them. It was considered a question solely between the State and the corporation.² In that case the charters of the banks after authorizing them to purchase lands, provided that the lands which it should be lawful for them to hold should be only such as were requisite for their immediate accommodation, or ac-

¹ *King v. Townshend*, 141 N. Y. 358. Said the court, per Finch, J: "No case was made sufficient to divest the grantees of the legal title, and vest it in an association, which probably could not take at all, and whether we regard the deed as one to the individuals merely, describing the reference to the association as matter of description (*Towar v. Hale*, 46 Barb. 361), or as conveying to some extent, also, for the benefit of others, the result is the same; for, in the latter case, there was undoubted authority to sell, entirely consistent with the possible or supposed trust, and in no respect a contravention of its purposes, so that the purchaser's title would be good, and not charged with responsibility for the due disposition of the proceeds." In the deed in the case cited the grantees were described as "trustees of the New York City Land Association," but ran to them as "joint tenants, to the survivor of them, his heirs and assigns forever." Where a deed is made to a person named "and associates," he takes the entire title, where there is nothing to show that there were associates with him in the title, or that he was connected with any person in the title, or that there was any limitation on his power to convey, or that there existed any purpose for inserting the term referring to associates. The individual grantee can convey a good title: *Ennis v. Brown*, 36 N. Y. Supp. 737; 1 App. Div. 22.

² *Banks v. Poitiaux*, 3 Rand. 136; 15 Am. Dec. 706.

quired in satisfaction of debts, and that they should not deal, directly or indirectly, in any other thing than bills of exchange, gold or silver bullion, etc. Green, J., said: "It seems to me that the charters are only directory in this respect; they impose no penalty in terms. They do not declare the purchase by or conveyance to the banks to be void, nor vest the title in the commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If in making the purchase of the land in question, the banks violated their charters, the corporation might for that cause be dissolved by a proceeding at the suit of the commonwealth, and even in that case it seems to be the better opinion, that the property if not previously conveyed to some other, would revert upon the dissolution of the corporation to the grantor and not to the commonwealth.¹ But any conveyance made by the corporation before its dissolution would be effectual to pass their title. The banks have therefore, a title which they can convey to the appellee, and which would in his hands be indefeasible. If, in this case, the banks violated their charter, by the purchase of the land in question, the maxim *factum valet quod fieri non debet* seems to apply. It would be extremely inconvenient if every contractor with one of these banks could, for the purpose of avoiding his contract, institute the inquiry whether the bank had violated its charter. They have a right to insist that the question should be tried by a jury, in a proceeding having that single object in view."² And this is a correct statement of the general rule.³ But in Michigan the court did not

¹ Co. Litt. 13 b.

² Banks v. Poitiaux, *supra*.

³ See Silver Lake Bank v. North, 4 Johns. Ch. 370; Storer v. Great Western Co., 2 Younge & C. Ch. 48; Natoma Water Co. v. Clarkin, 14 Cal. 544. In Natoma Water and Mining Co. v. Clarkin, *supra*, Chief Justice Field, in the petition for rehearing, said: "The plaintiffs are an incorporated company under the Act of April 14, 1853, by the fourth sec-

follow the rule announced by the Supreme Court of Virginia, on the ground that a court of equity will not lend its aid to enforce the performance of a contract against the spirit of terms of the charter of the corporation.¹ Where a restraint upon the right to take lands is imposed by a proviso, the party objecting is required to bring the case by proof within the operation of such proviso.² If, however a corporation is forbidden to purchase and hold real estate, a deed to it will not vest it with title,³ although it may be that the deed should not be considered void but merely voidable by the State,⁴ as the general

tion of which they are authorized 'to purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require.' Whether or not the premises in controversy are necessary for those purposes it is not material to inquire; that is a matter between the government and the corporation, and is no concern of the defined acts. It would lead to infinite inconveniences and embarrassments, if in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." In *California State Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 398, Cope, C. J., on page 429, says: "If the corporation, in making the purchase, has acquired property which, under the law of its incorporation, it had no right to acquire, all that can be said is that it has exceeded its powers, and may be deprived of its property by a judgment of forfeiture. The question is one which the State alone can raise. A purchase by a corporation in the face of a positive prohibition would be void; but that is not this case. There was no provision of law forbidding the purchase; and admitting that the corporation had no power to make it, the want of power in the absence of an express prohibition is not sufficient to avoid it as to third persons."

¹ *Michigan Bank v. Niles*, 1 Doug. 401; 41 Am. Dec. 575. A vendor cannot set aside a deed or executed contract upon this ground: *Barrow v. Nashville Turnpike*, 9 Humph. 304.

² *Ex parte Peru Iron Co.*, 7 Cowen, 540; *Dockery v. Miller*, 9 Humph. 731.

³ *Carroll v. East St. Louis*, 67 Ill. 568; 16 Am. Rep. 632; *St. Peters etc. Cong. v. Germain*, 104 Ill. 440; *Starkweather v. American Bible Society*, 72 Ill. 50; 22 Am. Rep. 133; *Hayward v. Davidson*, 41 Ind. 212; *United States Trust Co. v. Lee*, 73 Ill. 142; 24 Am. Rep. 236; *Fowler v. Scully*, 72 Pa. St. 456; 13 Am. Rep. 699; *Matthews v. Skinker*, 62 Mo. 329; 21 Am. Rep. 425; *Leazure v. Hillegas*, 7 S. & R. 313.

⁴ *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *Russell v. Railway Co.*, 68 Tex. 646; *National Bank v. Matthews*, 98 U. S. 621; *Myers v. McGavock*, 39 Neb. 843; 42 Am. St. Rep. 627; *Tarpey v. Deseret Salt Co.*, 5 Utah, 494.

rule is that an inquiry into the right of a corporation will not be permitted collaterally but will be allowed only in a direct proceeding for that purpose brought by the State.¹

§ 122. Corporation acting in other States.—Though a corporation has no legal existence out of the State in which it was created, yet it may do business in another State by the comity observed among the different States.² But the validity of an act performed in another State depends upon the laws of that State. Thus, where a coal company incorporated by the State of New York for the purpose of supplying a city of that State with coal, bought coal lands in Pennsylvania, and it appearing by the act of incorporation that the power to purchase and hold lands was given with a view to the purchase of lands in Pennsylvania, it was held by the Supreme Court of the United States that the right of the corporation to hold the lands

¹ *National Bank v. Whitney*, 103 U. S. 99; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221; *Jones v. Habersham*, 107 U. S. 174; *Seymour v. Slide & Spur Gold Mines*, 153 U. S. 523; *Land v. Coffman*, 50 Mo. 243; *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656; *Cowell v. Springs Co.*, 100 U. S. 55; *Ragan v. McElroy*, 98 Mo. 349; *Shewalter v. Pirner*, 55 Mo. 219; *Chambers v. St. Louis*, 29 Mo. 543; *Hovelman v. Kansas City etc. R. R. Co.*, 79 Mo. 632; *Thornton v. Nat. Exchange Bank*, 71 Mo. 221; *Atlantic & Pac. R. R. Co. v. St. Louis*, 66 Mo. 228. See, also, *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398; *Chicago, B. & Q. R. R. Co. v. Lewis*, 53 Iowa, 101; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208; *Mallett v. Simpson*, 94 N. C. 37; 55 Am. Rep. 494; *Hough v. Cook Co. Land Co.*, 73 Ill. 23; 24 Am. Rep. 230; *Alexander v. Tolleston Club*, 110 Ill. 65; *Baker v. Neff*, 73 Ind. 68; *Hayward v. Davidson*, 41 Ind. 212; *Carlow v. Aultman*, 28 Neb. 672; *Barnes v. Suddard*, 117 Ill. 237; *Russell v. Texas & Pac. Ry. Co.*, 68 Tex. 646; *Hanlon v. Union Pac. R. R. Co.*, 40 Neb. 52.

² *Farmers' Loan Co. v. McKinney*, 6 McLean, 1; *Lumbard v. Aldrich*, 8 N. H. 31; 28 Am. Dec. 381; *State v. Boston*, 25 Vt. 433; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Cowell v. Springs Co.*, 100 U. S. 55; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375; 56 Am. Rep. 776; *Fisk v. Patton*, 7 Utah, 399; *Tarpey v. Deseret Salt Co.*, 5 Utah, 494; *Northern Transp. Co. v. Chicago*, 7 Biss. 45; *Christian Union v. Yount*, 101 U. S. 352; *New York Dry Dock v. Hicks*, 5 McLean, 111; *Taylor v. Alliance Trust Co.*, 71 Miss. 694; *Connecticut Mut. Life Ins. Co. v. Cross*, 18 Wis. 109.

was dependent upon the express or implied consent of the State of Pennsylvania; and as it had been decided in that State that a corporation had a right to hold land until the government took some act to divest the estate, it was determined that the corporation purchasing the lands could hold them until an adverse proceeding was instituted by the State of Pennsylvania.¹ Unless the law or manifest policy of the State in which the land is situated forbids it, a foreign corporation, authorized by the jurisdiction in which it was created to hold real estate, may acquire and hold real estate in another State.² The rule with respect to contesting the right of foreign corporations to hold land in another State is the same that applies to domestic corporations. The question can be raised by the State only in a direct proceeding for that purpose.³

§ 123. The parties must be in esse at the time the conveyance is executed.—A deed made of a present estate to a party not living at the time of its execution is void.⁴

¹ *Runyan v. Cotter*, 14 Peters, 122.

² *Taylor v. Alliance Trust Co.*, 71 Miss. 694; *Santa Clara Academy v. Sullivan*, 116 Ill. 375; 56 Am. Rep. 776; *Missouri Lead Min. Co. v. Reinhard*, 114 Mo. 218; 35 Am. St. Rep. 746; *Christian Union v. Yount*, 101 U. S. 352; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109; *Whitman Mining Co. v. Baker*, 3 Nev. 386; *Reorganized Church v. Church of Christ*, 60 Fed. Rep. 937; *Runyan v. Coster*, 14 Pet. 122; *Cowell v. Springs Co.*, 100 U. S. 55; *Bank of Augusta v. Earle*, 13 Pet. 519; *Northern Transp. Co. v. Chicago*, 7 Biss. 45; *Claremont Bridge Co. v. Royce*, 42 Vt. 730; *Tarpey v. Deseret Salt Co.*, 5 Utah, 494; *Fisk v. Patton*, 7 Utah, 399; *White v. Howard*, 38 Conn. 342; *Lumbard v. Aldrich*, 8 N. H. 31; 28 Am. Dec. 381; *Newbury Petroleum Co. v. Weare*, 27 Ohio St. 343; *Carlow v. Aultman*, 28 Neb. 672; *Barnes v. Suddard*, 117 Ill. 237; *Alward v. Holmes*, 10 Abb. N. C. 96.

³ *Barnes v. Suddard*, 117 Ill. 237; *Leasure v. Union Mut. L. Ins. Co.*, 91 Pa. St. 491; *Cowell v. Springs Co.*, 100 U. S. 55; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208; *Fritts v. Palmer*, 132 U. S. 382; *Seymour v. Slide & Spur Gold Mines*, 153 U. S. 523; *Alexander v. Tolletson Club*, 110 Ill. 65; *American Mortgage Co. v. Tennille*, 87 Ga. 28; *O'Brien v. Wetherell*, 14 Kan. 616; *Reorganized Church v. Church of Christ*, 60 Fed. Rep. 937; *Myers v. McGavock*, 39 Neb. 843; 42 Am. St. Rep. 647.

⁴ *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543; *Phelan v. San*

Where there is a reasonable doubt of either of the parties being *in esse* at the time the deed is delivered, his existence must be shown as an affirmative fact to render the conveyance operative.¹

Francisco Co., 6 Cal. 531; Miller v. Chittenden, 2 Iowa, 368; Barr v. Schroeder, 32 Cal. 610. But this rule does not apply to remaindermen: 1 Wood on Conveyancing, 170, 172; Perkins, § 53; 3 Wash. Real. Prop. (4th ed.) 266.

¹ Hulick v. Scovil, 4 Ill. 191. See as to charitable uses, Miller v. Chittenden, 2 Iowa, 368; Potter v. Chapin, 6 Paige, 649; Brown v. Manning, 6 Ohio, 303; 27 Am. Dec. 255; Vidal v. Gerard's Exr., 2 How. 128. A deed to a corporation never created or organized can have no effect: Harriman v. Southam, 16 Ind. 190; Jones v. Cincinnati Type Foundry, 14 Ind. 89; Russell v. Topping, 5 McLean, 202.

CHAPTER V.

ALIENS TAKING BY DEED.

- § 124. Purchase by aliens.
- § 125. Office found.
- § 126. In England.
- § 127. In the United States.
- § 128. State regulation.
- § 129. Treaty paramount law.
- § 130. Resident aliens.
- § 131. Deed of alien before office found.
- § 132. Naturalization.

§ 124. **Purchase by aliens.**—By the common law of England, while an alien may purchase, he can do so only for the benefit of the king. The king is entitled to the land so purchased by virtue of his prerogative upon an office found.¹ Even if the conveyance was taken in the name of a trustee, it afforded the alien no protection.² An alien who is made a denizen by letters-patent of the king possesses the capacity of holding lands which are purchased after he becomes a denizen.³

§ 125. **Office found.**—Unless the proceeding of office found is perfected, an alien has the power to hold and convey the land *inter vivos*.⁴ And, at common law, if an

¹ Co. Litt. 2 *b*; *Dumoncel v. Dumoncel*, 13 L. R. Eq. 92.

² *The King v. Holland*, Allen, 14; 1 Ro. Ab. 194, pl. 8. See *Anstice v. Brown*, 6 Paige, 148. And the crown might enforce in its favor a devise in trust for an alien: *Barrow v. Wadkin*, 24 Beav. 1; *Burney v. MacDonald*, 15 Sim. 6; *Master v. De Croismar*, 11 Beav. 184. But where the devise is to trustees to sell for the benefit of the alien and others, the crown is not entitled to the alien's interest: *Du Hourmelin v. Sheldon*, 1 Beav. 79.

³ Co. Litt. 2 *b*.

⁴ Com. Dig. Alien, C (3); Co. Litt. 2 *b*; *Phillips v. Moore*, 100 U. S. 208; *Craig v. Bradford*, 3 Wheat. 594; *Cross v. De Valle*, 1 Wall. 5; *Gouverneur v. Robertson*, 11 Wheat. 332; *Munro v. Merchant*, 28 N. Y.

alien had purchased lands, and before office found had been made a denizen by the king, and the latter confirmed his estate, the confirmation would be operative.¹ It was considered that an alien had no capacity for transmitting by descent, and, therefore, his land upon his death vested by operation of law in the king, without the necessity of an office found.²

§ 126. **In England.**—These disabilities were removed by a statute passed in 1870, and an alien may now hold and dispose of property in the same manner and to the same extent that a natural born British subject may. The statute provides that “real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural born British subject, provided (1) that this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for an office, or for any municipal, parliamentary, or other franchise; (2) that this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; (3) that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition

9; *Smith v. Zaner*, 4 Ala. 99; *Dudley v. Grayson*, 6 Mon. 259; *Ramirez v. Kent*, 2 Cal. 558; *Waugh v. Riley*, 8 Met. 290; *Montgomery v. Dorion*, 7 N. H. 475. And see *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344; *Sheaffe v. O'Neil*, 1 Mass. 256; *Merle v. Matthews*, 26 Cal. 455; *Buchanan v. Deshon*, 1 Har. & G. 280; *Wadsworth v. Wadsworth*, 12 N. Y. 376; *Jenkins v. Noel*, 3 Stewt. 60; *People v. Folsom*, 5 Cal. 373; *Kottman v. Ayer*, 1 Strob. 552.

¹ *Fourdrin v. Gowdey*, 3 Mylne & K. 383.

² Com. Dig. Alien, C (3).

made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act.”¹

§ 127. **In the United States.**—In the United States, where there is any disqualification placed in the holding of lands by an alien, it is firmly settled that his title to land purchased or devised to him is good and valid against everybody but the State, and can be divested only by office found, or by some other act or proceeding taken by the State for the purpose of acquiring possession.² On this point it has been said: “An alien may purchase land or take it by devise, but he holds it at the will of the government. The government may at any time institute an inquest of office for the purpose of ascertaining whether he is an alien or not; and if it be found that he is, the estate or possession of the land is immediately vested in the people of the State, who before had only the right or title. The people cannot enter upon the possession of an alien without his judicial proceeding. His entry and possession and holding are lawful, and can be terminated only by regular legal proceedings.”³ Aliens may take by purchase or succession, lands held by the federal government.⁴

¹ 33, 34 Vict. ch. 14, § 2. The statute was passed May 12, 1870. The legislatures of British provinces have the power by section 12 to confer the privilege of naturalization within their own limits: See *Fitch v. Weber*, 5 Hare, 51; *Count De Wall's case*, 6 Moore P. C. C. 216; 12 Jur. 145; *Barrow v. Wadkin*, 24 Beav. 327; *Rittson v. Stordy*, 3 Smale & G. 230.

² *Jackson v. Adams*, 7 Wend. 367; *McCreery v. Allender*, 4 Har. & McH. 409; *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344; *Groves v. Gordon*, 1 Conn. 11; *Marshall v. Conrad*, 5 Call, 364; *Dudley v. Grayson*, 6 Mon. 267; *University v. Miller*, 3 Dev. 191; *Buchanan v. Deshon*, 1 Har. & G. 280; *Doe v. Horniblea*, 2 Hayw. (N. C.) 37; *Halstead v. Commissioners of Lake*, 56 Ind. 363; *People v. Conklin*, 2 Hill, 67; *Jenkins v. Noel*, 3 Stewt. 60; *Waugh v. Riley*, 8 Met. 295; *Doe v. Robertson*, 11 Wheat. 322; *Courtney v. Turner*, 12 Nev. 345; *Bradstreet v. Supervisors*, 13 Wend. 546; *Wibur v. Tobey*, 16 Pick. 179; *People v. Folsom*, 5 Cal. 378; *Ramirez v. Kent*, 2 Cal. 558; *Racouillat v. Sansevain*, 32 Cal. 376; *Foss v. Crisp*, 20 Pick. 124.

³ *Jackson v. Adams*, 7 Wend. 367, 368, per Sutherland, J. See *Jackson v. Beach*, 1 Johns. Cas. 401.

⁴ Brightley's Dig. tit. Land Presumption.

§ 128. **State regulation.**—Each State has the power of determining to what extent aliens may hold land within its territory. In some, the rights of aliens to hold lands are guarded by constitutional provisions; in others, the right is conferred by statute. Without entering into an examination of the different statutes, or the rules by which they and constitutions are to be construed, it may be stated that no restrictions to the acquisition of lands by aliens exist in Alabama,¹ Colorado,² Florida,³ Illinois,⁴ Iowa,⁵ Kansas,⁶ Maine,⁷ Massachusetts,⁸ Michigan,⁹ Minnesota,¹⁰ Mississippi,¹¹ Missouri,¹² Ohio,¹³ Nebraska,¹⁴ New Hampshire,¹⁵ New Jersey,¹⁶ South Carolina,¹⁷ Wisconsin.¹⁸ In other States, conditions of various kinds, such as residence, limitation of time within which claim must be made, and disposition of land within specified time, are imposed. Among the States where statutes of this nature prevail are Arkansas, California, Connecticut, Delaware, Indiana, Kentucky, Maryland, New York, Tennessee, Virginia, and Texas.¹⁹ In Rhode Island, a statute provided

¹ Code 1866, §§ 2860, 2861, p. 677.

² Gen. Laws, ch. 4, § 15.

³ Laws of Florida (McClellan's Dig. 1881), ch. 92, §§ 7, 14, p. 470.

⁴ Rev. Stats. (Hurd), 1880, ch. 6, § 1, p. 136.

⁵ Code, § 1908, pt. 2, tit. 13, ch. 1. See *Krogan v. Kinney*, 15 Iowa, 242; *Rheim v. Robins*, 20 Iowa, 45; *Purczell v. Smidt*, 21 Iowa, 540; *Brown v. Pearson*, 41 Iowa, 481.

⁶ Gen. Stats., p. 40.

⁷ Rev. Stats., pp. 449, 559.

⁸ Gen. Stats., ch. 90, § 83; Pub. Stats. 1882, pt. 2, tit. 1, ch. 126, § 1, p. 744.

⁹ Compiled Laws 1871, p. 79; Const., art. xviii., § 13.

¹⁰ Gen. Stats. 1873, § 22; Stats. 1878, ch. 75, § 41, p. 820.

¹¹ Rev. Code 1880, § 1230.

¹² Rev. Stats. 1879, § 325, p. 49. See *Wacker v. Wacker*, 26 Mo. 426; *Sullivan v. Burnett*, 4 Morr. Trans. 671.

¹³ Rev. Stats. 1880, § 4173.

¹⁴ Const., art. i., § 25; Comp. Stats. (Brown), 1881, ch. 73, § 54, p. 394.

¹⁵ Gen. Laws, ch. 135, § 16.

¹⁶ Rev. of 1877, pp. 6, 296.

¹⁷ Rev. Stats., pp. 440-537.

¹⁸ Rev. Stats. 1878, ch. 99, § 2200.

¹⁹ Ark. Code 1874, § 2167; Cal. Const. 1879, art. i, § 17; Cal. Civ. Code, §§ 671, 672, 1405; Conn. Stats. 1866, p. 137; Del. Rev. Code 1874,

that aliens might hold land provided they had previously obtained a license from the court. It was held that this statute did not affect the principle that aliens may take land by deed and hold it against all but the sovereign, until office found, and that this principle existed in that State as elsewhere.¹ Protection will be given to an alien in the possession of public lands as against trespassers who do not connect themselves with the government title.² But this protection will not be given against one who shows connection with the title of the government.³

p. 493; Ind. Rev. of 1876, ch. 11; Ky. Gen. Stats. 1873, p. 191; Md. Code, Rev. Code 1878, art. lxv. § 8; N. Y. Fay's Dig. 1876, pp. 552, 553; Tenn. Th. & St. Stats. 1871, p. 953; Va. Code 1873, p. 130, ch. 4, tit. 2, § 18; Tex. Rev. Stats. 1879, §§ 9, 1658; Pasch An. Dig. (2d ed.), art. lxvii. p. 106. In Texas, an alien has the term of nine years in which to dispose of real estate that he has acquired: *Barclay v. Cameron*, 25 Tex. 232. See *Phillips v. Moore*, 100 U. S. 208; *Osterman v. Baldwin*, 6 Wall. 216; *Sattergarl v. Schrimpf*, 35 Tex. 323. As to the rule in New York, see *Goodrich v. Russell*, 42 N. Y. 177; *Ettenbeimer v. Hellman*, 66 Barb. 374; *Heeney v. Brooklyn*, 33 Barb. 360. As to Kentucky, see *Eastlake v. Rodaquest*, 11 Bush, 42; *Yeaker v. Yeaker*, 4 Met. 33. As to Michigan, see *Crane v. Reeder*, 21 Mich. 24; 4 Am. Rep. 430. As to Iowa, see *Purcell v. Smidt*, 21 Iowa, 540; *Greenhold v. Stanforth*, 21 Iowa, 595. By section 2676 of the Georgia Code it is provided that lands may be acquired on the condition that improvements are made and the holding is limited to one hundred and sixty acres. In Pennsylvania, an alien is permitted to hold five thousand acres: *Brightley's Purdon Dig.* 67.

¹ *Cross v. De Valle*, 1 Wall. 1, 13.

² *Courtney v. Turner*, 12 Nev. 345. Beatty, J., delivering the opinion of the court, said: "An alien will be protected in the possession of the public lands the same as a citizen. Neither can hold as against the government title; but the defendants have not shown, or offered to show, that they have the government title, or that they have taken any steps to obtain it. They are mere naked trespassers upon the possession of one who, so far as the proof goes, has as much right as they have to occupy any portion of the public lands."

³ *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 312. Under the Mexican law an alien might hold land until proceedings were taken to divest title: *Merle v. Matthews*, 26 Cal. 455; *Phillips v. Moore*, 100 U. S. 208; *Hammeken v. Clayton*, 2 Woods, 336. "The question as to the right of a nonresident alien to hold property at common law, and as we understand it under the civil law, was a matter between the alien and the government, and could not be called in question on a collateral proceeding between individuals. The proceeding at common law to divest an alien of property purchased is by an inquest of office, and until office found an alien may hold real estate. Under the civil law, there was some analo-

§ 129. **Treaty paramount law.**—It is now settled, that State laws placing restrictions upon the right of aliens to hold lands must yield to treaties made by the federal government with foreign States giving their subjects the right to hold real estate. Such treaties are a part of the local law of each State, and are superior to all State constitutional provisions or legislative enactments.¹ An alien, it is held, may maintain an action for the recovery of land in case of an intrusion.²

§ 130. **Resident aliens.**—A provision in a State constitution providing that aliens who are *bona fide* residents of the State may hold land is not restrictive in its operation, and the legislature has the power of extending this

gous proceeding": *Racouillat v. Sansevain*, 32 Cal. 386. See, also, 2 *Escreshe Partidos Hispano Mexicanos*, 696; 2 *Sala Mexicana*, 240. And see *Holliman v. Peebles*, 1 Tex. 673; *Yates v. Iams*, 10 Tex. 168; *Clay v. Clay*, 26 Tex. 24; *La Coste v. Odam*, 26 Tex. 458; *Barrett v. Kelly*, 31 Tex. 476.

¹ *Hauenstein v. Lynham*, 100 U. S. 483; *Chirac v. Chirac*, 2 Wheat. 259; *Carneal v. Banks*, 10 Wheat. 181; *Hughes v. Edwards*, 9 Wheat. 489; *Orr v. Hodgeson*, 4 Wheat. 453; *Geofroy v. Riggs*, 133 U. S. 258; *Wunderle v. Wunderle*, 144 Ill. 40; *Kull v. Kull*, 37 Hun, 476. The court in *Hauenstein v. Lynham*, per Mr. Justice Swayne, said: "It must always be borne in mind that the constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity": See, also, *Shanks v. Dupont*, 3 Peters, 242; *Hoster & Elam v. Neilson*, 2 Peters, 253; *The Cherokee Tobacco*, 11 Wall. 616; *Mr. Pinkney's Speech*, 3 Elliot's Constitutional Debates, 281; *The People etc. v. Gerke & Clark*, 5 Cal. 381. And see *Ware v. Hylton*, 3 Dall. 242; *Fairfax v. Hunter's Lessee*, 7, Cranch, 627; 8 Op. Att'y. Gen. 415; *Hallock Int. Law*, 157; 4 Kent's Com. 420.

² *Bradstreet v. Supervisors*, 13 Wend. 546; *McCreery v. Allender*, 4 Har. & McH. 409; *Jackson v. Britton*, 4 Wend. 507; *Waugh v. Riley*, 8 Met. 295; *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344. See, also, *Gansevoort v. Lunn*, 3 Johns. Cas. 109; *Orser v. Hoag*, 3 Hill, 79; *Jackson ex dem. Culverhouse v. Beach*, 1 Johns. Cas. 399; *Lareau v. Davignon*, 1 Buff. N. Y. Sup. Ct. 128; *Bonaparte v. Camden etc. R. R. Co.*, 1 Bald. 316; *Commonwealth v. Andre*, 3 Pick. 224. At common law an alien could not maintain either real or mixed actions (Co. Litt. 2b); but he might maintain personal actions: *Story's Eq. Plead.*, §§ 51, 52. And see *Taylor v. Carpenter*, 3 Story, 458; s. c. 2 Wood. & M. 1; *Coats v. Holbrook*, 2 Sand. Ch. 586; *Byam v. Stevens*, 4 Edw. Ch. 119; *Breedlove v. Nicolet*, 7 Peters, 413.

right to nonresident foreigners. The effect of a constitutional provision of this character is to remove the common-law disability which otherwise would rest upon resident foreigners, and the rights which it confers may be enlarged, but cannot be abridged by the legislature.¹ The State may interpose an information to forfeit land held by an alien against a claim by an alien plaintiff who seeks to recover the land.²

§ 131. **Deed of alien before office found.**—While it is said in some cases that where the alien has conveyed land by deed, it is liable to forfeiture in the hands of the grantee,³ yet the rule seems to be when the disability of alienage exists, that an alien may convey lands acquired by him by purchase before office found, and his deed will transfer a good and valid title, if the grantee is capable of holding. It is not the object of the State to add to its revenue by the confiscation of property, but to protect itself from the danger of allowing persons who owe it no allegiance to own land within its boundaries, and perhaps use the profits derived from the land in acts of hostility to the State. For this reason is it that the land may be

¹ *People v. Rogers*, 13 Cal. 159; *Purcell v. Smidt*, 21 Iowa, 540; *Norris v. Hoyt*, 18 Cal. 217. In *People v. Rogers*, *supra*, Baldwin, J., delivering the opinion of the court, said: "The object of this provision was to secure a certain protection to resident aliens as might be in the State at the time of a descent. But this short sentence was not designed to comprehend all the law in respect to aliens. The legislature could not, indeed, abridge this privilege, but it was not disabled from extending it or adding other privileges. It might as well be urged that because the constitution provided that no law should be passed impairing the obligation of contracts, no legislative regulation could be had; or, because a homestead was exempted from forced sale, there could be no exemption of other property. The alien is secured by the constitution in this one privilege, but he may be secured by the legislature in as many more as it chooses to give, provided there is no conflict with any constitutional restrictions upon its power": See *United States v. Fox*, 94 U. S. 315; *Etheridge v. Malempre*, 18 Ala. 565.

² *Reid v. The State ex el. Thompson*, 74 Ind. 252.

³ *People v. Conklin*, 2 Hill, 67; *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344.

forfeited to the State.¹ An alien cannot prevent the performance of a specific contract relating to real estate by pleading his alienage as a bar.² As to whether an alien before office found can maintain an action to recover real estate, the better view is that he can.³ If land is to be conveyed to a citizen in trust to convert into money as soon as practicable, and deliver the same to an alien, there is no intention that the trustee shall hold the land for the benefit of the alien, and such a trust is valid.⁴

§ 132. **Naturalization.**—The naturalization of an alien will confirm a title which he had previously acquired by either purchase or devise.⁵ But it will not have the effect of enabling him to take lands as an heir, to which if capable of holding he would have been entitled before his naturalization.⁶ Where land is granted by the United States to an alien, and the same escheats for the absence of heirs capable of holding, the land does not revert to

¹ *Montgomery v. Dorion*, 7 N. H. 475; *Halstead v. Board of Commissioners of Lake County*, 56 Ind. 363; *Marshall v. Conrad*, 5 Cal. 364; *Foxwell v. Craddock*, 1 Pat. & H. 250; *Sheaffe v. O'Neil*, 1 Mass. 256.

² *Scott v. Thorpe*, 1 Edw. Ch. 512.

³ *Bradstreet v. Supervisors of County of Oneida*, 13 Wend. 546. And see *Norris v. Hoyt*, 18 Cal. 217; *McCreery's Lessee v. Allender*, 4 Har. & McH. 409; *Apthorp v. Backus*, Kirby, 407; 1 Am. Dec. 26; *Sabriego v. White*, 30 Tex. 576; *Airhart v. Massieu*, 8 Otto, 491. In *Laurens v. Jenny*, 1 Spear, 356, the court doubted that he had such right.

⁴ *Anstice v. Brown*, 6 Paige, 448; *Craig v. Leslie*, 3 Wheat. 563. An alien may hold land until the fact of alienage has been officially found: *Gray v. Kauffman*, 82 Tex. 65; *Halstead v. Lake Co.*, 56 Ind. 363; *Baker v. Westcott*, 73 Tex. 129; *Norris v. Hoyt*, 18 Cal. 217; *Phillips v. Moore*, 100 U. S. 208; *Quigley v. Birdseye*, 11 Mont. 439; *Williams v. Bennett*, 1 Tex. Civ. App. 498; *People v. Folsom*, 5 Cal. 373; *Merle v. Matthews*, 26 Cal. 455; *Carlow v. Aultman*, 28 Neb. 672; *Sands v. Lynham*, 27 Gratt. 295; 21 Am. Rep. 348; *American Mortgage Co. v. Tennille*, 87 Ga. 28; *Waugh v. Riley*, 8 Met. 290; *Osterman v. Baldwin*, 6 Wall. 116; *Ramires v. Kent*, 2 Cal. 558.

⁵ *Harley v. State ex rel. Attorney General*, 40 Ala. 689; *Jackson ex dem. Doran v. Green*, 7 Wend. 333; *Osterman v. Baldwin*, 6 Wall. 116; *Baker v. Westcott*, 73 Tex. 129; *Foss v. Crisp*, 20 Pick. 121.

⁶ *People v. Conklin*, 2 Hill, 67; *Vaux v. Nesbit*, 1 McCord Ch. 372; *Heeney v. Trustees of Brooklyn Benevolent Society*, 33 Barb. 360; *Keenan v. Keenan*, 7 Rich. 345.

the federal government, but is taken by the State as sovereign of the realty.¹ By a sufficiently long and undisturbed possession an alien, it has been held in Massachusetts, may acquire a title valid against the State.²

¹ *Etheridge v. Doe ex dem. Malempre*, 18 Ala. 565.

² *Piper v. Richardson*, 9 Met. 155.

CHAPTER VI.

NECESSITY OF A WRITING—PART PERFORMANCE.

- § 133. Deeds must be written upon paper or parchment.
- § 134. Comments.
- § 135. Printed deeds.
- § 136. Whether writing with ink is necessary.
- § 137. Parol contracts may be enforced in case of part performance.
- § 138. Where this doctrine does not prevail.
- § 139. The basis upon which the principle rests.
- § 140. Part performance must have been done by the party seeking the enforcement of the contract.
- § 141. Acts must be done in pursuance of the agreement.
- § 142. Convincing proof required.
- § 143. Letter as memorandum of contract.
- § 144. Part performance of an agreement for several acts.
- § 145. Rule with reference to the taking of possession.
- § 146. Possession must be in pursuance of agreement.
- § 147. Relief when possession taken based upon equitable considerations.
- § 148. Parol gift of land.
- § 149. Compensation at law the test.
- § 150. What is a sufficient possession.
- § 151. Possession alone.
- § 152. Fraudulent omission of part of land from deed.
- § 153. Length of time over which possession extends.
- § 154. Character of possession.
- § 155. Possession contemporaneous with contracts.
- § 156. Possession must be in pursuance of the agreement—Pre-existing tenancy.
- § 157. Possession upon parol partition.
- § 158. Disputed boundaries.
- § 159. Parol exchange.
- § 160. Erection of improvements.
- § 161. Nature of improvements.
- § 162. Compensation for improvements.
- § 163. Benefit from the use of the land—Comments.
- § 164. One view.
- § 165. Opposite view.
- § 166. Comments.
- § 167. Parol contract for conveyance of land between parent and child.
- § 168. Consideration.

- § 169. Acts not considered part performance.
- § 170. Payment of money merely is not part performance.
- § 171. Reasons for the rule.
- § 172. When payment of money part performance.
- § 173. Part performance by marriage.

§ 133. Deeds must be written upon paper or parchment.—Writing upon paper or parchment has been considered one of the requisites of a valid deed. "It may be in any character or language, but it should be upon paper or parchment; for it is said that if it be written on stone, board, linen, leather, or the like, it is no deed. Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself more perfectly than in any other way both those desirable qualities, for there is nothing else so durable and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable."¹

§ 134. Comments.—As the universal practice is for deeds to be written upon paper or parchment, it is perhaps of little practical importance to inquire whether the validity of a deed is affected by the character of the material upon which it is written. But it may well be doubted that this is the rule at the present day, or that any other suitable material would not do as well. Practically, deeds are always written upon paper or parchment; but if written upon any other substance, no good reason can be given why they should be considered invalid for this reason alone.

§ 135. Printed deeds.—A deed wholly in printing, or partly printed and partly written, is considered a deed in writing within the meaning of the statute requiring a written instrument. A printed signature has been held

¹ 2 Blackst. Com. 297; Co. Litt. 239 a; Wood on Conveyancing, 126; Shep. Touch. 50, 54. "To prevent frauds from easy alterations, the writing must be on paper or parchment, for if it be written on wood, linen, the bark of a tree, a stone, or the like, and it be delivered as a deed, it will not have that operation:" 2 Bouvier's Inst. 389.

sufficient under the statute of frauds requiring certain contracts to be signed by the party to be charged thereby.¹ But under the Revised Statutes of New York, a memorandum is required to be "subscribed"; and this is held to mean an actual, manual subscription in writing, and not to include a printed signature.²

§ 136. **Whether writing with ink is necessary.**—Deeds are generally written with ink, but it can scarcely be doubted that if written with a lead pencil or any other means by which a perceptible mark is made, they would be valid. There does not seem to be any case in which the question has arisen, whether a writing with lead pencil affected the validity of a deed. But it is held that a memorandum written by pencil satisfies the requirements of the statute of frauds, and wills and codicils written in pencil have been frequently held valid.³ "The statute requires a writing. It does not undertake to define with what instrument or with what material the contract shall be written. It only requires it to be in *writing* and signed, etc. The verdict here finds that the memorandum was written, but it proceeds further and tells us with what instrument it was written, viz., with a lead pencil. But what have we to do with the kind of instrument which the parties employed when we find all that the statute required, viz., a memorandum of the contract in *writing*, together with the names of the parties. To write is to express our ideas by letters visible to the eye. The mode or manner of impressing those letters is no part of the substance or definition of writing. A pencil is an instrument with which we write without ink."⁴

¹ Browne on Statute of Frauds, § 356 (4th ed.), p. 441; *Saunderson v. Jackson*, 3 Esp. 180; *Schneider v. Norris*, 2 Maule & S. 286. See *Commonwealth v. Ray*, 3 Gray, 447; *Lerned v. Wannemacher*, 9 Allen, 417.

² *Vielie v. Osgood*, 8 Barb. 130; *Davis v. Shields*, 26 Wend. 351. See *Pitts v. Beckett*, 13 Mees. & W. 743.

³ *Geary v. Physic*, 5 Barn. & O. 234; *Merritt v. Clason*, 12 Johns. 102; 7 Am. Dec. 286.

⁴ *Clason v. Bailey*, 14 Johns. 484, 491. The chancellor continuing, said: "The ancients understood alphabetic writing as well as we do, but

§ 137. Parol contracts may be enforced in case of part performance.—While title to real property can be

it is certain that the use of paper, pen, and ink was for a long time unknown to them. In the days of Job they wrote upon lead with an iron pen. The ancients used to write upon hard substances, as stones, metals, ivory, wood, etc., with a style or iron instrument. The next improvement was writing upon waxed tables, until at last paper and parchment were adopted, when the use of *calamus* or reed was introduced. The common law has gone so far to regulate writings as to make it necessary that a deed should be written on paper or parchment, and not on wood or stone. This was for the sake of durability and safety, and this is all the regulation that the law has prescribed. The instrument or the material by which letters were to be impressed on paper or parchment has never yet been defined. This has been left to be governed by public convenience and usage, and as far as questions have arisen on this subject, the courts have with great latitude and liberality, left the parties to their own discretion. It has accordingly been admitted (2 Blackst. Com. 297; 2 Bos. & P. 238; 3 Esp. 180), that printing was writing within the statute, and (2 Brown. 585) that stamping was equivalent to signing, and (8 Ves. 175) that making a mark was subscribing within the act. I do not find any case in the courts of common law in which the very point now before us has been decided, viz., whether writing with a lead pencil was sufficient; but there are several cases in which such writings were produced and no objection taken. The courts have impliedly admitted that writing with such an instrument without the use of any liquid was valid. Thus, in a case in Comyn's Reports, page 451, the counsel cited the case of Loveday v. Claridge in 1730, where Loveday, intending to make his will, pulled a paper out of his pocket, wrote some things down with ink, and some with pencil, and it was held a good will. But we have a more full and authentic authority in a late case decided at doctors' commons (Raymes v. Clarkson, 1 Phillim. Rep. 22), where the very question arose in the validity of a codicil written with a pencil. It was a point over which the prerogative court had complete jurisdiction, and one objection taken to the codicil was the material with which it was written, but it was contended on the other side that a man might write his will with any material he pleased *quocunque modo velit quocunque modo possit*, and it was ruled by Sir John Nicholl, that a will or codicil written in pencil was valid in law." Promissory notes and contracts written with a lead pencil are valid: Partridge v. Davis, 20 Vt. 499; Merritt v. Clason, 12 Johns. 102; 7 Am. Dec. 286; Closson v. Stearns, 4 Vt. 11; 23 Am. Dec. 245; Brown v. Butchers' etc. Bank, 6 Hill (N. Y.), 443; 14 Am. Dec. 755; Clason v. Bailey, 14 Johns. 490; Geary v. Physic, 5 Barn. & C. 234. So are wills: Main v. Ryder, 84 Pa. St. 217; Tomlinson's Estate, 133 Pa. St. 245; 19 Am. St. Rep. 637; Myers v. Vanderbilt, 84 Pa. St. 510; 24 Am. Rep. 227; Harris v. De Pue, 39 Md. 535; Mence v. Mence, 18 Ves. Jr. 348. An indictment may be partly printed and partly written: O'Bryan v. State, 27 Tex. App. 340. A verdict in a criminal case need not necessarily be in ink: State v. Anderson, 45 La. An. 651.

conveyed only by an instrument in writing, courts of equity will enforce a conveyance where part performance of the contract has taken place. This power is always, however, exercised with great reluctance. The court will refuse to interfere at the suit of a party seeking the enforcement of a verbal contract for the sale of land, unless some act has been done that places the purchaser in a situation which would be a fraud upon him, should the contract not be executed.¹

¹ *Arguello v. Edinger*, 10 Cal. 150. In this case Field, J., in delivering the opinion of the court, said (p. 158): "The jurisdiction of courts of equity to decree a specific execution of verbal contracts in certain cases, was asserted very soon after the passage of the English Statute of 29 Charles II. That statute was intended as a protection against the perpetration of fraud by the assertion of pretended agreements and attempts to support them by perjury; and courts of equity in enforcing contracts not made in conformity with its provisions, acted not upon any assumed authority to dispense with the statute, but with a view to carry out its true spirit and policy. Thus, where a verbal contract was alleged in the bill, and admitted in the answer, without the defendants insisting upon the statute, a specific performance was decreed, upon the obvious grounds that the admission of the contract took the case out of the mischiefs against which the statute was intended to guard; and the failure to insist upon the statute was a waiver of its protection: 1 Fonb. Eq., ch. 3, § 8; *Attorney General v. Day*, 1 Ves. 221; *Gunter v. Halsey*, Amb. 586; *Newland on Confs.* 201; *Spurrier v. Fitzgerald*, 6 Ves. 548; *Story's Equity*, § 755. So, where a verbal contract had been so far performed by one of the parties, relying upon the good faith of the other, that he could have no adequate remedy except by complete performance, courts of equity decreed its execution, upon the ground that the refusal to execute the same under such circumstances was a fraud, and that a statute, having for its object the prevention of fraud, could not be used as an instrument for its perpetration; 1 Fonb. Eq. ch. 3, § 8; *Foxcroft v. Lester*, 2 Vern. 456; *Newland on Const.* 181; *Morphett v. Jones*, 1 Swanst. 181; *Story's Equity*, § 759. The jurisdiction of courts of equity thus early asserted to enforce a specific execution of verbal contracts, notwithstanding the statute of frauds, has been uniformly maintained in England ever since, and is now too firmly established to admit of question, and in almost every State of the Union, which has admitted the general provisions of the English statute, the jurisdiction is unquestioned. The statute of this State contains a legislative recognition of its existence, in cases of part performance, when, in the tenth section of the first chapter, it provides that 'nothing contained in this chapter shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance of such agreements.' It is true that eminent judges have at different times ques-

§ 138. Where this doctrine does not prevail.—In Mississippi, it is the settled rule that neither part performance nor any other thing will take a case out of the operation of the statute of frauds.¹ In Maine, the courts do not possess such equity powers as will authorize them to decree specific performance of a parol agreement to convey real estate in cases of part performance.² Nor will a parol contract for the sale of lands be enforced in North Carolina and Tennessee, though there has been part performance.³ And in Kentucky, specific performance in cases of this kind will be decreed only when a failure to do so would work peculiar injury and hardship to the purchaser.⁴ In an early California case, the court quotes

tioned the wisdom of allowing exceptions to the statute, and have declared their intention not to extend them beyond the established precedents; but none have gone so far as to deny the power of a court of equity to grant relief in a clear case where the refusal to complete the contract would operate as a fraud upon the purchaser. The statute of this State is almost literally copied from the statute of New York, and in that State the equity powers of the court are, on few subjects, more frequently exercised than on the enforcement of the specific execution of verbal contracts for the sale of land, in cases of part performance": See *Tohler v. Folsom*, 1 Cal. 207.

¹ *Fisher v. Kuhn*, 54 Miss. 480. Semrall, C. J., said: "It has long been the settled doctrine of this court not to accept part performance, or any other thing, as an exception to take the case out of the operation of the statute": *Hairston v. Jaudon*, 42 Miss. 380; *McGuire v. Stevens*, 42 Miss. 724, 732; 2 Am. Rep. 649; *Beaman v. Buck*, 9 Smedes & M. 210; *Box v. Stanford*, 13 Smedes & M. 93; 51 Am. Dec. 142.

² *Wilton v. Harwood*, 23 Me. 131. The court decided that it was not the intention of the Revised Statutes to authorize, under any circumstances, a decree for the specific performance of contracts not made in writing. See, also, *Bubier v. Bubier*, 24 Me. 42; *Stearns v. Hubbard*, 8 Greene, 320.

³ *Barnes v. Brown*, 71 N. C. 507; *Ridley v. McNairy*, 2 Humph. 174; *Patton v. M'Clure*, Mart. & Y. 333. In North Carolina, the decisions are based upon the language of their statute. But when specific performance is refused, the plaintiff is permitted to recover the amount of his payments and outlays for improvements: See *Love v. Neilson*, 1 Jones Eq. 339; *Barnes v. Teague*, 1 Jones Eq. 277; 62 Am. Dec. 200; *Ellis v. Ellis*, 1 Dev. Eq. 345; *Allen v. Chambers*, 4 Ired. Eq. 125; *Dunn v. Moore*, 3 Ired. Eq. 364; *Albea v. Griffin*, 2 Dev. & B. Eq. 9; *Plummer v. Owens*, 1 Bush. Eq. 254.

⁴ *Worley v. Tuggle*, 4 Bush, 168, 190.

with approval the opinion of Lord Redesdale,¹ that, "the statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door to fraud, and that under pretense of part execution, if possession is had in any way whatsoever, means are frequently found to put a court of equity in such a situation, that without departing from its rules, it feels itself obliged to break through the statute." The court took the view that it was evident that the courts would have returned to obedience to the enactment were it not that they felt bound by the numerous decisions recognizing the doctrine of part performance, and that as the State was young, and her judicial system had been less than four years in existence, there was no such compulsion resting upon the courts in California. Accordingly, it decided that an unwritten contract for the sale of land is void by the express declaration of the statute of frauds, and a court of equity has no power to enforce a specific performance of it.² But in a subsequent case this doctrine was disapproved, and the court affirmed its power to enforce specific performance in a proper case.³

¹ In *Lindsay v. Lynch*, 2 Schoales & L. 1.

² *Abell v. Calderwood*, 4 Cal. 90.

³ *Arguello v. Edinger*, 10 Cal. 150, 158. The court said: "The plaintiffs rely in support of the demurrer upon the opinion of this court in *Abell v. Calderwood*, 4 Cal. 90. From the statement of the reporter it does not appear that there were any acts of part performance alleged in that case to take the verbal contract from the operation of the statute. The opinion, however, goes beyond the facts of the case, and denies in general language the authority of a court of equity to decree a specific performance of a verbal contract in any case. So far as the opinion passes out of the facts of the case, it cannot be regarded as authority, and we do not feel any embarrassment in departing from its conclusions."

In Massachusetts, the courts now have power to enforce parol agreements when there has been part performance; but formerly their jurisdiction was confined to the enforcement of written contracts alone.¹

§ 139. The basis upon which the principle of part performance rests.—As a general proposition, nothing is to be considered a part performance which, in case of the non-execution of the contract, does not import the commission of a fraud.² The ground upon which this rule of equity is founded is thus stated by Lord Westbury: "The court of equity has, from a very early period, decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud, an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title (or right) under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of frauds."³ In addition to the idea of fraud, when possession has been taken and improvements made by a purchaser, it has been stated as a further ground for the enforcement of the agreement, that unless this was done, he would be a trespasser, and liable in damages as such.⁴

¹ *Jacobs v. Peterborough & Shirley R. R. Co.*, 8 Cush. 223; *Brooks v. Wheelock*, 11 Pick. 439; *Dwight v. Pomeroy*, 17 Mass. 303, 327; 9 Am. Dec. 148; *Buck v. Dowley*, 16 Gray, 555.

² *Tilton v. Tilton*, 9 N. H. 385; 2 Story's Eq. 66; Fonbl. Eq. 260. See *Campbell v. Fetterman*, 20 W. Va. 398.

³ *McCormick v. Grogan*, Law R. 4 H. L. 82, 97.

⁴ Lord Redesdale, in *Clinan v. Cooke*, 1 Schosles & L. 22, said: "I take it that nothing is to be considered as a part performance, which does not put the party into a situation that is a fraud upon him unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, if there be no agreement": See, also, *Lester v. Foxcraft*, 1 Colles, 108; *Farrar v. Patton*, 20 Mo. 81; *Despain v. Carter*, 21 Mo. 331; *White v. Watkins*, 23 Mo. 423; *Chambers v. Lecompte*, 9 Mo. 569; *Feusier v. Sneath*, 3 Nev. 120; *Hawkins v. Hunt*, 14 Ill. 42; *Underhill v. Williams*, 7 Blackf. 125;

§ 140. **Part performance must have been done by the party seeking the enforcement of the contract.**—The party asking the interposition of a court of equity to decree the specific execution of a parol contract for the conveyance of land, must himself directly, or by his agents or representatives, have performed the acts upon which his right for equitable relief is based. Acts done by others cannot avail as part performance. The only effect that acts done by the other party can have, is to show the existence of an agreement. But his refusal to complete the bargain is not a fraud upon the party asking that the contract be specifically performed, and equity will not enforce a verbal agreement simply because its existence is shown.¹ The acts of arbitrators, therefore, in a case for a parol division of lands, though performed in pursuance of the bargain, do not take the case out of the operation of the statute.²

§ 141. **Acts must be done in pursuance of the agreement.**—The acts performed should have reference to a distinct agreement of which it is claimed they are in part performance. As Chancellor Kent says: "It is well settled that if a party sets up part performance to take a parol agreement out of the statute, he must show acts unequivocally referring to and resulting from *that* agree-

Buckmaster *v.* Harrop, 7 Ves. 346; Mundy *v.* Jolliffe, 5 Milne & C. 177; Bond *v.* Hopkins, 1 Schoales & L. 433; Morphett *v.* Jones, 1 Swanst. 181; Attorney General *v.* Day, 1 Ves. 221; Walker *v.* Walker, 2 Atk. 100; Meynell *v.* Surtees, 3 Smale & G. 101; Farrall *v.* Davenport, 3 Giff. 363; Caton *v.* Caton, Law R. 1 Ch. 137; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 274, 284; Rathbun *v.* Rathbun, 6 Barb. 99, 106; Meach *v.* Perry, 1 Chip. D. 189; 6 Am. Dec. 719; Eyre *v.* Eyre, 4 Green Ch. 102; Gilbert *v.* Trustees, 1 Beasl. 180, 204; Allen's Estate, 1 Watts & S. 383; Greenlee *v.* Greenlee, 22 Pa. St. 225; M'Kee *v.* Phillips, 9 Watts, 85; Moore *v.* Small, 19 Pa. St. 461; Hamilton *v.* Jones, 3 Gill & J. 127; Gough *v.* Crane, 3 Md. Ch. 118; Anthony *v.* Leftwich, 3 Rand. 255; Townsend *v.* Houston, 1 Har. (Del.) 532; 27 Am. Dec. 732.

¹ Luckett *v.* Williamson, 37 Mo. 388; Caton *v.* Caton, Law R. 1 Ch. 137; Buckmaster *v.* Harrop, 7 Ves. 341; Rathbun *v.* Rathbun, 6 Barb. 98. But see Lowe *v.* Bryant, 30 Ga. 528; 76 Am. Dec. 673; Whitedge *v.* Parkhurst, 20 Md. 62.

² Cooth *v.* Jackson, 6 Ves. 12.

ment; such as the party would not have done unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the *same* with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed."¹ Or to adopt the language of Lord Hardwicke: "It must be such an act done as appears to the court would not have been done except on account of the agreement."² This principle is frequently applied in the case of tenants seeking the enforcement of a parol contract, who have remained in possession or made such improvements as were customary. If these acts are performed in their character as tenants, specific performance

¹ *Phillips v. Thompson*, 1 Johns. Ch. 131, 149. See, also, *Campbell v. Fetterman*, 20 W. Va. 398; *Cooth v. Jackson*, 6 Ves. 12; *Sutton v. Myrick*, 39 Ark. 424; *Brewer v. Wilson*, 17 N. J. Eq. 180; *Mundorff v. Kilbourn*, 4 Md. 459; *Aday v. Echols*, 18 Ala. 353; 52 Am. Dec. 225; *Smith v. Crandall*, 20 Md. 482; *Bunton v. Smith*, 40 N. H. 352; *Wallace v. Brown*, 10 N. J. Eq. 308; *Charpiot v. Sigerson*, 25 Mo. 63; *Williamson v. Williamson*, 4 Iowa, 279; *Goodhue v. Barnwell*, Rice Eq. 198; *Petrick v. Ashcroft*, 19 N. J. Eq. 339; *O'Reilly v. Thompson*, 2 Cox, 271; *Jervis v. Smith*, Hoff. Ch. 470; *North v. Forest*, 15 Conn. 400; *Osborn v. Phelps*, 19 Conn. 74, 75; 48 Am. Dec. 133; *Peckham v. Barker*, 8 R. I. 17; *Cole v. Potts*, 2 Stockt. Ch. 67; *Cox v. Cox*, 26 Pa. St. 375; 67 Am. Dec. 432; *Eckert v. Eckert*, 3 Pa. 332; *Frye v. Shepler*, 7 Barr. 91; *Robertson v. Robertson*, 9 Watts. 32; *Moore v. Small*, 7 Harris (19 Pa. St.), 461; *Duvall v. Myers*, 2 Md. Ch. 401; *Moale v. Buchanan*, 11 Gill. & J. 314; *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Gough v. Crane*, 3 Md. Ch. 118, 132; *Hall v. Hall*, 2 McCord Ch. 274; *Smith v. Smith*, 1 Rich. Eq. 130, 133; *Hatcher v. Hatcher*, 1 McMull. Eq. 311, 318; *Davis v. Moore*, 9 Rich. 215; *White v. Watkins*, 23 Mo. 423, 428.

² *Lacon v. Mertins*, 3 Atk. 3, 4. See, also, *Anderson v. Chick*, 1 Bail. Eq. 118; *Hood v. Bowman*, Freem. Ch. 290, 293; *Stoddert v. Tuck*, 4 Md. Ch. 475; *Wolfe v. Frost*, 4 Sand. Ch. 72; *Reese v. Reese*, 41 Md. 554; *Lester v. Kinne*, 37 Conn. 9; *Semmes v. Worthington*, 38 Md. 298; *Gunter v. Halsey*, Amb. 586; *Carlisle v. Fleming*, 1 Har. (Del.) 421; *Wheeler v. Reynolds*, 66 N. Y. 227; *Morgan v. Bergen*, 3 Neb. 209; *Horn v. Ludington*, 32 Wis. 73; *Pierce v. Catron*, 23 Gratt. 588; *Billingslea v. Ward*, 33 Md. 48; *Knoll v. Harvey*, 19 Wis. 99.

will not be decreed.¹ A mere honorary agreement will not be enforced.²

§ 142. **Convincing proof required.**—There must be convincing proof of the parol agreement;³ and the agreement must be clear, certain, and definite, the remedy mutual, and the party seeking relief free from laches.⁴ And it is necessary that the agreement partly performed appear to be the same with the one alleged.⁵

§ 143. **Letter as memorandum of contract.**—If an owner of land writes a letter to a person stating that he has agreed with one to sell the latter the land, and stating also the terms of the agreement, and containing a general description of the land and designating the price for

¹ *Wills v. Stradling*, 3 Ves. 378; *Ex parte Hooper*, 19 Ves. 479; *Morphett v. Jones*, 1 Swanst. 181; *Brennan v. Bolton*, 2 Dru. & Walsh, 349; *Frame v. Dawson*, 14 Ves. 386.

² Two persons executed mutual wills on the same day. On the death of one of them, it was claimed that there was part performance attributable to the agreement. But the court considered it an honorary engagement, not capable of enforcement: *Lord Walpole v. Lord Orford*, 3 Ves. 402.

³ *Sutton v. Myrick*, 39 Ark. 424; *Reynolds v. Waring*, Younge, 346; *Brown v. Brown*, 47 Mich. 378.

⁴ *Hopkins v. Roberts*, 54 Md. 312; *Miller v. Cotten*, 5 Ga. 341; *Printup v. Mitchell*, 17 Ga. 558; 63 Am. Dec. 258; *Minturn v. Baylis*, 33 Cal. 129; *Long v. Duncan*, 10 Kan. 294; *Force v. Dutcher*, 18 N. J. Eq. 401; *Charnley v. Hansbury*, 13 Pa. St. 16; *Brewer v. Wilson*, 17 N. J. Eq. 180; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Petrick v. Ashcroft*, 19 N. J. Eq. 339; *Blanchard v. McDougal*, 6 Wis. 167; 70 Am. Dec. 458; *Allen v. Webb*, 6 Ill. 342; *Wright v. Wright*, 31 Mich. 380; *Hall v. Hall*, 1 Gill, 383; *Shropshire v. Brown*, 45 Ga. 175; *Goose v. Jones*, 73 Ill. 508; *Stoddert v. Tuck*, 5 Md. 37; *Smith v. Crandall*, 20 Md. 500; *Semmes v. Worthington*, 38 Md. 298; *Reese v. Reese*, 41 Md. 554. The evidence must not be contradictory: *Rowton v. Rowton*, 1 Hen. & M. 92. See, also, *Broughton v. Coffey*, 18 Gratt. 184; *Bash v. Bash*, 9 Pa. St. 260; *Sanders v. Wagonseller*, 19 Pa. St. 248; *Lantz v. Frey*, 19 Pa. St. 366; *Candor's Appeal*, 5 Watts & S. 515; *McCue v. Johnston*, 25 Pa. St. 306.

⁵ *Chesapeake etc. Canal Co. v. Young*, 3 Md. 480; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133; *Harris v. Knickerbacker*, 5 Wend. 638; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Beard v. Linthicum*, 1 Md. Ch. 345; *Haight v. Child*, 34 Barb. 186; 4 Kent's Com. 12th ed. 451.

which it was to be sold, there is a sufficient memorandum of the contract of sale to enable it to be enforced.¹

§ 144. Part performance of an agreement for several acts.—In the case of a fraudulent omission of a part of the contract from the written agreement, the writing may be ignored and the entire transaction regarded as a contract by parol; and when the agreement has been partly performed, parol proof of the whole agreement may be received without reference to the writing.² If several lots of land be bought by a verbal purchase, but each lot is considered as separately sold, the purchaser may have the benefit of part performance as to one of them, without being allowed to do so as to the others.³ If a contract be made for the benefit of a third person who is not a party to the contract, he may enforce a parol promise, in a proper case.⁴

§ 145. Rule with reference to the taking of possession.—Where possession has been delivered, a court of equity as a general proposition will decree a specific performance of the parol contract.⁵ In compliance with the award of referees, tenants in common had agreed to make partition, and they had accordingly executed deeds for that purpose. In one of the deeds a tract of land assigned to a party was omitted by mistake. Possession was taken

¹ *Moss v. Atkinson*, 44 Cal. 3.

² *Phyfe v. Wardell*, 2 Edw. Ch. 47.

³ *Buckmaster v. Harrop*, 7 Ves. 344. And see *Smith v. Underdunk*, 1 Sand. Ch. 579.

⁴ *Crocker v. Higgins*, 7 Conn. 342.

⁵ *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266; *Davis v. Townsend*, 10 Barb. 333; *Pugh v. Good*, 3 Watts & S. 56; 37 Am. Dec. 534; *Burns v. Sutherland*, 7 Pa. St. 103; *Pleasanton v. Raughley*, 3 Del. Ch. 124; *Simmons v. Hill*, 4 Har. & McH. 251; 1 Am. Dec. 398; *Bassler v. Niesly*, 2 Serg. & R. 352; *Jones v. Peterman*, 3 Serg. & R. 543; 8 Am. Dec. 716; *Letcher v. Crosby*, 2 Marsh. A. K. 106; *Abbott v. Draper*, 4 Denio, 51; *Wilber v. Paine*, 1 Ohio, 251; *Peifer v. Landis*, 1 Watts, 392; *M'Farland v. Hall*, 3 Watts, 37; *Hoffman v. Fett*, 39 Cal. 109; *Miller v. Hower*, 2 Rawle, 53; *Follmer v. Dale*, 9 Pa. St. 83; *Gill v. Newell*, 13 Minn. 462. See *contra*, *Catlett v. Bacon*, 33 Miss. 269.

by the parties according to their deeds. The court rectified the mistake, and decreed a specific performance as to the omitted tract.¹

§ 146. Possession must be in pursuance of the agreement.—Possession of the land is not of itself part performance. It is necessary that the delivery of possession should be in pursuance and part execution of the alleged agreement; and the possession must be of such a nature that it would render the person exercising it liable as a wrongdoer without the complete execution of the contract. An agreement had been made between a father and his son, to the effect that if the son with his family would come and live with the father, and take care of him and of the farm so long as he should live, he would give the son the farm. The court said it was not to be implied that the father would give up the possession of the farm, such possession not being necessary to the accomplishment of the conditions agreed upon. The court construed the agreement as a contract on the part of the father to give to the son, provided he should fulfill the conditions proposed, a title to the farm by a testamentary devise, or by some instrument of conveyance, to take effect at the death of the father, and considered that possession of the farm by the son during the lifetime of the father was not possession delivered in part execution of the agreement.² The payment of the purchase money alone is not part performance, yet when it precedes or

¹ *Tilton v. Tilton*, 9 N. H. 385. Wilcox, J., said: "It is no objection to the power of a court of equity to decree a specific performance, that the contract is proved only by parol testimony. The cases to that effect which have been cited from Massachusetts and Maine (*Dwight v. Pomeroy*, 17 Mass. 303, 9 Am. Dec. 148, and *Stearns v. Hubbard*, 8 Greenl. 320) rest upon the peculiar provisions of their statutes conferring chancery powers. This court has the power to decree the specific performance of contracts generally without qualification (2 Laws, 75); and it is a reasonable construction that our powers on this subject conform substantially to the practice of courts of chancery in England, so far as that practice may be applicable to our condition."

² *Ham v. Goodrich*, 33 N. H. 32.

accompanies the taking of possession, it is a circumstance to be considered.¹

§ 147. **Relief where possession taken, based upon equitable consideration.**—"The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract."² The right of a person to specific performance who has made an oral agreement for the purchase of land and has paid the consideration, and, having entered into possession, has erected a building upon the purchased property, is not absolute, but rests in the sound discretion of the court, to be exercised upon considerations of an equitable nature, and with a proper regard for all the circumstances of the case.³ A court of equity has no power

¹ *Pike v. Morey*, 32 Vt. 37; *Underhill v. Williams*, 7 Blackf. 125; *Byrd v. Odem*, 9 Ala. 755; *Wimberly v. Bryn*, 55 Ga. 98; *Tibbs v. Barker*, 1 Blackf. 58; *Fitzsimmons v. Allen*, 39 Ill. 440; *Billington v. Welsh*, 5 Binn. 129; 6 Am. Dec. 406; *Gilday v. Watson*, 2 Serg. & R. 407; *Drury v. Conner*, 6 Har. & J. 288; *Sutton v. Sutton*, 13 Vt. 71; *Adams v. Fullam*, 43 Vt. 592; *Ramsey v. Liston*, 25 Ill. 114; *Stevens v. Wheeler*, 25 Ill. 300; *Astor v. Lamoreaux*, 4 Sand. 524; *Kellums v. Richardson*, 21 Ark. 37. And see *Merithew v. Andrews*, 4 Barb. 200; *M'Kee v. Phillips*, 9 Watts, 85.

² *Grover, J.*, in *Freeman v. Freeman*, 43 N. Y. 34, 38; 3 Am. Rep. 657. In that case the plaintiff had put his son and his son's wife in possession of a tract of land. Before doing so, he told them that it should be theirs as long as they lived, and that "he had bought the place for a home for them, and gave it to them." They had retained possession of the land, and subsequently had cleared the land in part and made improvements upon it.

³ *Curran v. Holyoke Water Power Co.*, 116 Mass. 90. In *Barnes v. Boston and Maine R. R.*, 130 Mass. 388, there was an oral agreement to release to a person one of two parcels of land included in its location and owned by him, at the time the location was filed, upon the consideration that he should not demand or collect damages for taking the land so released. The court held the agreement to be within the statute of frauds, and that neither the building of fences by the corporation, after the

to determine a controversy of disputed boundary, where no question in equity arises.¹

§ 148. **Parol gift of land.**—A parol gift of land receives the same protection as a parol agreement to sell it, if accompanied by possession, and valuable improvements have been made, in consequence of the promise to give it.² A parol agreement was made between two brothers who owned their property in common. One of the brothers had become subject to dangerous attacks of epilepsy, and required constant care and attention. He agreed with his other brother that if the latter should take care of him during life, he should have, as compensation for his services, all of the former's real and personal property. The court held that the vendee was entitled to a specific performance, and that the contract was so far certain and reasonable in the terms that equity would decree its enforcement.³ While a parol gift of

agreement was made, dividing the land referred to from the land used by the corporation for its railroad, and the digging of a new channel along the dividing line for a brook, nor the refraining by the owner from the collection of compensation for the taking of the land which the agreement covered, and the continued occupation by him of the land, constitute such part performance as to warrant a decree in equity that the agreement be specifically performed.

¹ *Tilmes v. Marsh*, 67 Pa. St. 511; *Norris' Appeal*, 64 Pa. St. 275.

² *Neale v. Neale*, 9 Wall. 1; *Manly v. Howlett*, 55 Cal. 94; *Freeman v. Freeman*, 51 Barb. 306. See *Dugan v. Gettings*, 3 Gill. 157; 43 Am. Dec. 306; *Syler v. Eckhart*, 1 Binn. 378; *King's Heirs v. Thompson*, 9 Peters, 221; *Harsha v. Reid*, 45 N. Y. 419; *Peters v. Jones*, 35 Iowa, 512, 515.

³ *Rhodes v. Rhodes*, 3 Sand. Ch. 279. But, as a general rule, it seems that there must be something more than mere possession, for it may be said in cases of this character that possession does not negative the idea of a permission to occupy the land: *Cronk v. Trumble*, 66 Ill. 428; *Stewart v. Stewart*, 3 Watts, 253; *Pinckard's Heirs v. Pinckard*, 23 Ala. 649; *Irwin v. Dyke*, 114 Ill. 302; *Kinyon v. Young*, 44 Mich. 339; *Poorman v. Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 425; *Littlefield v. Littlefield*, 51 Wis. 23; *Neale v. Neale*, 9 Wall. 11; *Johns v. Johns*, 67 Ind. 440; *Guynn v. McCauley*, 32 Ark. 97; *Gorham v. Dodge*, 122 Ill. 528; *Smith v. Yocum*, 110 Ill. 142; *Bohanan v. Bohanan*, 96 Ill. 591; *Sower v. Weaver*, 84 Pa. St. 262; *Story v. Black*, 5 Mon. 26; 51 Am. Rep. 37; *McDowell v. Lucas*, 97 Ill. 489; *Clark v. Clark*, 122 Ill. 388; *Shellhammer v. Ashbough*, 83 Pa. St. 24.

land, followed by possession and improvement of the land by the donee, is so far executed that the donee is entitled to a specific performance, yet, in an action of ejectment by a subsequent grantee of the donor, this defense, to be available, must be specially pleaded.¹

§ 149. **Compensation at law the test.**—The question which courts are called upon to decide in determining whether specific performance should be decreed is, is compensation at law incapable of being made under the contract? And the delivery of possession and erection of improvements have been considered to be acts for which damages would not afford an adequate remedy.² In a case in Texas, A made a parol agreement with B for the latter's conveyance to A of a lot in a city at the expiration of A's lease. Placing reliance on this parol promise, A erected improvements on such lot. B died before the lease expired, without executing the deed. There was no administration on B's estate. The court held that A was entitled to a specific performance, and that B's heirs were the proper parties.³

¹ *Manly v. Howlett*, 55 Cal. 94.

² Upon this subject reference is made to the following cases: *Breckinridge v. Clinkinbeard*, 2 Litt. 127; 13 Am. Dec. 261; *Pleasanton v. Raughley*, 3 Del. Ch. 124; *Larison v. Burt*, 4 Watts & S. 27; *Horn v. Ludington*, 32 Wis. 73; *Paine v. Wilcox*, 16 Wis. 202; *Williams v. Morris*, 95 U. S. 457; *Ponce v. McWhorter*, 50 Tex. 562; *Wiley v. Bradley*, 60 Ind. 62; *Ottenhouse v. Burleson*, 11 Tex. 87; *Stoddert v. Tuck*, 5 Md. 18; *Mayer v. Adrian*, 77 N. C. 83; *Hobbs v. Wetherwax*, 38 How. Pr. 390; *Bennett v. Abrams*, 41 Barb. 619. *Riesz's Appeal*, 73 Pa. St. 485, was a case where the wife of defendant declined to execute a deed, and the court declared it would not enforce a specific performance unless the vendee was willing to pay the purchase money in full upon the receipt of the husband's deed without the wife. In *Parkhurst v. Van Cortland*, 14 Johns. 15, 7 Am. Dec. 427, the vendor had encouraged the vendees to improve and build on the land, by assurances that he would take no advantage of their labors, and that, when his title had been perfected by a partition of the land, they should have a lease in fee or a deed at the price then paid for wild lands.

³ *Hibbert v. Aylott*, 52 Tex. 530. See, also, *Potter v. Jacobs*, 111 Mass. 32; *Brown v. Brown*, 33 N. J. Eq. 650; *Bechtel v. Cone*, 52 Md. 608; *Smart v. Smart*, 24 Hun, 127; *Tracy v. Tracy*, 14 W. Va. 243; *West Virginia Oil Co. v. Vinal*, 14 W. Va. 637; *Hanlon v. Wilson*, 10 Neb. 138;

§ 150. **What is a sufficient possession.**—Courts of equity exercise their power to decree specific performance, as we have seen, for the prevention of fraud. Hence, in any given case, the possession of the vendee must be of such a character that the refusal of the vendor to complete the agreement will be a fraud. On this ground is founded the decision that where possession has been taken of land under a parol contract for its purchase and afterwards abandoned, specific execution will not be enforced.¹ Where two persons live in the same house, of which one is the owner, an agreement by the latter to convey the house to the other in return for his support and care will, in case of performance during the owner's life, be enforced against his heirs.² When possession has been taken under a verbal agreement for a lease for one year with the privilege of renewing for two years more, and the rent for the first year has been paid, the lessee may obtain a decree of specific performance against the lessor.³ But even the payment of the purchase money and the erection of improvements are not sufficient to take the case out of the statute, when the possession after the sale is a mere continuance of a prior possession.⁴ The possession must not only be with the permission of the vendor, but a direct consequence of the agreement and referable to it.⁵

Vickers v. Sisson, 10 W. Va. 12; *Peckham v. Barker*, 8 R. I. 17; *Ingles v. Patterson*, 36 Wis. 73; *Guynn v. McCauley*, 32 Ark. 97; *Fleming v. Carter*, 87 Ill. 565; *Troup v. Troup*, 87 Pa. St. 149; *Piffner v. S. & St. P. R. R. Co.*, 23 Minn. 343; *Gregg v. Hamilton*, 12 Kan. 333; *Fall v. Hazelrigg*, 45 Ind. 576; 15 Am. Rep. 278; *Gibert v. Peteler*, 38 N. Y. 165; 97 Am. Dec. 785; *Thompson v. Gould*, 20 Pick. 134; *Wells v. Calnan*, 107 Mass. 514; *Bacon v. Simpson*, 3 Mees. & W. 78; *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621; *Massie v. Watts*, 6 Cranch, 148; *Hiatt v. Williams*, 72 Mo. 214; 37 Am. Rep. 438.

¹ *Chambliss v. Smith*, 30 Ala. 366. See *Cuppy v. Hixon*, 29 Ind. 522; *White v. Watkins*, 23 Mo. 423.

² *Watson v. Mahan*, 20 Ind. 225. See *Fisher v. Moolick*, 13 Wis. 321.

³ *Clark v. Clark*, 49 Cal. 586.

⁴ *Pearson v. East*, 36 Ind. 27; *Carlisle v. Brennan*, 67 Ind. 12; *Suman v. Springate*, 67 Ind. 115.

⁵ *Lord v. Underdunk*, 1 Sand. Ch. 46. See *Jervis v. Smith*, 1 Hoff. Ch. 470; *Wills v. Stradling*, 3 Ves. 381; *Cole v. White*, 1 Bro. 409; *Harris v. Knickerbacker*, 5 Wend. 638; *Givens v. Calder*, 2 Desaus. Eq. 171, 190;

§ 151. Possession alone.—It is said in some cases that possession alone is not enough to entitle a party to specific performance, that either payment or the expenditure of money on the land is also required.¹ But this is a narrow view, not in accord with the weight of authority. Where there is a parol agreement for a partition, instructions to a scrivener to draw the necessary writings, and entry upon the land for the purpose of marking the lines of division, to obtain an accurate description of the several lots, are not such acts as will be deemed a part performance.² “Whether possession be an unequivocal act amounting to part performance, must depend upon the transaction itself. If it be distinctly referred to the contract alleged in the pleadings, I think no case has denied that it is part performance. The defendant is protected from liability as a trespasser, and the plaintiff is disabled from dealing with any other person.”³ An oral agreement was made between a father and two of his sons, that if they would take charge of the farm and earn a certain sum of money for the father, he would give the farm to them. The sons managed the farm and retained the profits, but the land was assessed to the father without objection from the sons, and it was held that the sons, after the death of the father, were not entitled to have the farm conveyed to them.⁴

§ 152. Fraudulent omission of part of land from deed.—Where a vendor by fraudulent misrepresentations

2 Am. Dec. 686; *Thompson v. Scott*, 1 McCord Ch. 39; *Hood v. Bowman*, Freem. (Miss.) 290; *Wood v. Farmare*, 10 Watts, 195; *Atkins' Heirs v. Young*, 12 Pa. St. 15; *Christy v. Barnhart*, 14 Pa. St. 260; 53 Am. Dec. 538; *Carrolls v. Cox*, 15 Iowa, 455; *Moore v. Higbee*, 45 Ind. 487.

¹ See *Moore v. Small*, 19 Pa. St. 461; *Dougan v. Blocher*, 24 Pa. St. 28; *Ballard v. Ward*, 89 Pa. St. 358.

² *Gratz v. Gratz*, 4 Rawle, 411.

³ *Lord Manners*, in *Kine v. Balfe*, 2 Ball & B. 343. See *Poland v. O'Connor*, 1 Neb. 50; 93 Am. Dec. 327; *Anderson v. Simpson*, 21 Iowa, 399; *Tatum v. Brooker*, 51 Mo. 148; *Anderson v. Chick*, 1 Bail. Eq. 124; *Hatcher v. Hatcher*, 1 McMull. Eq. 311; *Poag v. Sandifer*, 5 Rich. Eq. 170.

⁴ *Larison v. Polhemus*, 36 N. J. Eq. 506.

prevails upon a purchaser of land, who has paid the purchase price and assumed possession, to accept a deed from which a portion of the land verbally agreed to be conveyed is omitted, the purchaser is permitted to maintain a suit for the specific performance of the agreement.¹

§ 153. Length of time over which possession extends. It is always regarded as an additional reason for enforcing performance, that possession has been retained for a considerable period of time. Thus, in a case of a verbal agreement for the purchase and conveyance of lands where the vendor had caused them to be surveyed, had received a large portion of the purchase price and had transferred possession to the vendee, which he allowed him to hold for several years without an attempt to terminate it, the court considered part performance clearly established.² Where, for seven years preceding the suit, the land with the consent of the vendor had been assessed to the vendee, and it was shown that the vendor had admitted the giving of possession to the vendee, it was held sufficient performance to take the case out of the statute.³

§ 154. Character of possession.—When reliance is placed upon possession as an act of part performance, such possession, it is clear, must be visible, notorious, and exclusive on the part of the vendee; and it must further appear that such possession has been taken under and in pursuance of the parol agreement.⁴ Accordingly, a

¹ *Beardsley v. Duntley*, 69 N. Y. 577. And see *Hollis v. Edwards*, 1 Vern. 159; *Mundy v. Jolliffe*, 5 Mylne & C. 167; *Rhodes v. Rhodes*, 3 Sand. Ch. 279; *Morphett v. Jones*, 1 Swanst. 181; *Butcher v. Staply*, 1 Vern. 363; *Pyke v. Williams*, 2 Vern. 455; *Gregory v. Mighell*, 18 Ves. 328; *Pain v. Coombs*, 1 De Gex & J. 34.

² *Bornier v. Caldwell*, 8 Mich. 463. And see *Blatchford v. Kirkpatrick*, 6 Beav. 232.

³ *Miranville v. Silverthorn*, 1 Grant Cas. 410; *Palmer v. Richardson*, 3 Strob. Eq. 16; *Rhea v. Jordan*, 28 Gratt. 678; *Murray v. Jane*, 8 Barb. 612; *Knickerbacker v. Harris*, 1 Paige, 209; *Lester v. Lester*, 28 Gratt. 737.

⁴ *Brown v. Lord*, 7 Over. 2; 19 Alb. L. J. 461; *Haslett v. Haslett*, 9 Watts, 464; *Robertson v. Robertson*, 9 Watts, 32; *Sage v. M'Guire*, 4

specific performance for the sale of real estate by one partner to another will not be enforced where the only change of possession is the withdrawal of the vendor and the continuance of the vendee in possession, because possession is not taken by the latter under the contract.¹ Where a parol agreement is made for the sale of several lots of land, and one gross sum is to be paid for the land as an entirety, taking possession of one of the lots would be sufficient.² But where several parcels of land are sold by separate and distinct agreements, the taking of possession of one parcel would remove from the statute only that particular lot.³

§ 155. Possession contemporaneous with contract.—The possession must be contemporaneous with the contract, or an immediate consequence and in direct pursuance of it. Possession before and at the time the supposed contract is entered into, and the bare continuation of that possession, cannot be deemed as the taking of possession under such contract.⁴ Thus, for in-

Watts & S. 228; *Frye v. Shepler*, 7 Pa. St. 91; *Blakeslee v. Blakeslee*, 22 Pa. St. 237; *Wible v. Wible*, 1 Grant Cas. 406; *Workman v. Guthrie*, 29 Pa. St. 495; 72 Am. Dec. 654; *Charpiot v. Sigerson*, 25 Mo. 63; *Irwin v. Dyke*, 114 Ill. 302; *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270; *Story v. Blake*, 5 Mont. 26; 51 Am. Rep. 37; *Johns v. Johns*, 67 Ind. 440; *Brown v. Lord*, 7 Or. 302; *Padfield v. Padfield*, 92 Ill. 198; *Moore v. Gordon*, 44 Ark. 334; *Moore v. Small*, 19 Pa. St. 461; *Brown v. Brown*, 33 N. J. Eq. 650; *Brawdy v. Brawdy*, 7 Pa. St. 157; *Larison v. Polhemus*, 36 N. J. Eq. 506; *Gonham v. Dodge*, 122 Ill. 528; *Montgomery v. Carlton*, 56 Tex. 361.

¹ *Wiimer v. Farris*, 40 Iowa, 309.

² *Smith v. Underdunk*, 1 Sand. Ch. 579; *Jones v. Pease*, 21 Wis. 644. But see *contra*, *Allen's Estate*, 1 Watts & S. 383; *Small v. N. P. R. R. Co.*, 20 Fed. Rep. 753. The rule stated in the text is but following the principle governing the sale of personal property: *Elliott v. Thomas*, 3 Mees. & W. 170; *Scott v. Eastern Co.*, 12 Mees. & W. 33; *Price v. Lea*, 1 Barn. & C. 156; *Biggs v. Wisking*, 25 Eng. L. & Eq. 257; *Mills v. Hunt*, 17 Wend. 333; *McKnight v. Dunlop*, 5 N. Y. 537; 55 Am. Dec. 370; *Boutwell v. O'Keefe*, 32 Barb. 434.

³ *Buckmaster v. Harrop*, 7 Ves. 341. The possession may be suspended temporarily (*Drum v. Stevens*, 94 Ind. 181), but it cannot be abandoned: *Chambliss v. Smith*, 30 Ala. 366.

⁴ *Aitkin's Heirs v. Young*, 12 Pa. St. 15. See, also, *Danforth v. DEEDS*, VOL. 1.—12

stance, the continuance in possession by a tenant, as in the cases referred to in the following section, cannot be considered such a part performance or taking of possession as to take a case out of the statute. The possession must result from the agreement, and unequivocally refer to it.¹

§ 156. Possession must be in pursuance of the agreement—Pre-existing tenancy.—If the purchaser under a parol agreement is a tenant of the vendor, his continued possession will be referred to the tenancy, and not to the contract of sale.² The rule is that the statute will be enforced and specific performance denied, when reliance is placed upon possession which may be attributed to any other cause than the alleged parol contract.³ The rule stated as applicable to a contract for purchase where the tenant is in possession, also prevails in case of a parol agreement for a different term of tenure. In the absence of circumstances showing that possession is referable to the last agreement, it will be considered as an incident of the original tenancy, and necessarily the parol

Laney, 28 Ala. 274; *Kaufman v. Cook*, 114 Ill. 11; *Brown v. Lord*, 7 Or. 302; *Haines v. McGlone*, 44 Ark. 79; *Creighton v. Landers*, 89 Ill. 543; *Armstrong v. Katterhorn*, 11 Ohio, 265; *Johnston v. Haney*, 4 Blackf. (Ind.) 94; 28 Am. Dec. 45; *Billingslea v. Ward*, 33 Md. 48; *Greenlee v. Greenlee*, 22 Pa. St. 225; *Wilmer v. Farris*, 40 Iowa, 309.

¹ *Mahana v. Blunt*, 20 Iowa, 142; 1 Story's Eq. Juris. § 763. The possession must be in the lifetime of the vendor to have force: *Ryan v. Wilson*, 56 Tex. 36; *Shirey v. Cumberhouse*, 41 Ark. 97; *Sage v. McGuire*, 4 Watts & S. (Pa.), 228. But see, where improvements had been made by tenant under a lease, the vendor having died before the lease expired: *Hibbert v. Aylott*, 52 Tex. 530.

² *Blanchard v. McDougal*, 6 Wis. 167; 70 Am. Dec. 458. If, however, it was specially agreed at the time of the purchase, and as a part of it, that the tenancy from that time should cease, and the possession should be considered to be under such contract, it would seem that such possession with the payment of the purchase money would avail as part performance: *Blanchard v. McDougal*, 6 Wis. 167. As cases in which the principle stated in the text has been applied, see *Mahana v. Blunt*, 20 Iowa, 142; *Rosenthal v. Freeburger*, 26 Md. 75.

³ *Danforth v. Laney*, 28 Ala. 274; *Charpiot v. Sigerson*, 25 Mo. 63; *Cole v. Potts*, 10 N. J. Eq. 67; *Knoll v. Harvey*, 19 Wis. 99; *Sitton v. Shipp*, 65 Mo. 297; *Tate v. Jones*, 16 Fla. 216.

contract will be void.¹ Where a person contemplating the purchase of land resided temporarily with the owner as a guest, during the pendency of negotiations for its purchase, it was held that there was not such part performance as to take the case out of the statute.² If a purchaser under a parol contract takes possession and subsequently attorns to the vendor as landlord, or assumes any other relation than that of a purchaser in possession, his possession will be referred to his last agreement, and he will be deemed to have abandoned his equities.³ That possession is referable to the original tenancy in the absence of proof to the contrary is but a presumption, and does not apply to cases where it is apparent by the acts of the parties that they are not referable to the continuance of the old relation.⁴ Thus, a solicitor acting for both parties was instructed by the lessee, at the request of the lessor, to prepare a written lease in accordance with the terms previously agreed upon; a draft contract was written out by the solicitor from a memorandum made by him, and this contract was given to the lessor for his approval. He placed the lessee in possession, and instructed the solicitor to draw a lease conforming to the draft contract. The lessor objected to the lease when presented to him, and gave the tenant notice to quit. The agreement was enforced on the ground that there had been part performance.⁵

¹ *Armstrong v. Katterhorn*, 11 Ohio, 265; *Anthony v. Leftwich*, 3 Rand. 238; *Jones v. Peterman*, 3 Serg. & R. 543; 8 Am. Dec. 672; *Johnston v. Glancy*, 4 Blackf. 94; 28 Am. Dec. 45; *Crawford v. Wick*, 18 Ohio St. 190; 98 Am. Dec. 103.

² *Davis v. Moore*, 9 Rich. 215. See *Nay v. Mograin*, 24 Kan. 75.

³ *Rankin v. Simpson*, 19 Pa. St. 471; 57 Am. Dec. 668. See *Brawdy v. Brawdy*, 7 Pa. St. 157; *Williams v. Landman*, 8 Watts & S. 55.

⁴ *Spalding v. Conzelman*, 30 Mo. 177; *Blanchard v. McDougal*, 6 Wis. 167; 70 Am. Dec. 458; *Dowell v. Dew*, 1 Younge & C. Ch. 345; *Spear v. Orendorf*, 26 Md. 37.

⁵ *Pain v. Coombs*, 1 De Gex & J. 34. Where a father verbally agreed with his son that the land for which he (the father) held a written contract of purchase should be divided in equal parts between them, and after conveyance by the vendor, the father and son each remained in possession of his respective allotment during the father's life, it was held that part performance took the agreement out of the statute of frauds:

§ 157. **Possession upon a parol partition.**—If followed by an actual possession, a partition by parol of a tract of land owned by several grantees is valid and obligatory.¹ But it will not have this effect unless there be a transfer of possession.² “What, then, it is asked, can there be no sale of land by parol among tenants in common where all are in possession? Certainly not, because the statute of frauds and perjuries forbids, and there cannot be such part performance as would take it out of the operation of that wise and salutary rule of titles.”³ Where a mother and son, tenants in common of land, made an oral agreement for the sale of the mother’s undivided half to the son, in consideration of the payment by him to his brother of a certain sum of money, and of an agreement to support the mother during the rest of her life, and the son, having fully performed the conditions, managed the land, made valuable improvements thereon, and retained possession of it, it was held that he was entitled to a conveyance.⁴

§ 158. **Disputed boundaries.**—An agreement between parties to hold in severalty certain portions of land, the title to which is in dispute, will be valid if followed by possession.⁵ An agreement for the settlement of a disputed boundary is not considered a conveyance of an interest in land.⁶ If made by parol, and accompanied by possession, it will, therefore, be binding.⁷

Rhine v. Robinson, 27 Pa. St. 30. See *Lee v. Lee*, 9 Pa. St. 169; *Stockley v. Stockley*, 1 Ves. & B. 23; *Neale v. Neale*, 1 Keb. 672.

¹ *Ebert v. Wood*, 1 Binn. 216; 2 Am. Dec. 436; *Corbin v. Jackson*, 14 Wend. 619; 28 Am. Dec. 550; *Williams v. Pope*, Wright, 406; *Platt v. Hubbell*, 5 Ohio, 243; *Cummins v. Nutt*, Wright, 713; *Calhoun v. Hays*, 8 Watts & S. 127; 42 Am. Dec. 275; *Wilday v. Bonney*, 31 Miss. 644.

² *Slice v. Derrick*, 2 Rich. 627. See *Sweeny v. Miller*, 34 Me. 388; *Young v. Frost*, 1 Md. 377.

³ *Woodward, J.*, in *Workman v. Guthrie*, 29 Pa. St. 495; 72 Am. Dec. 654.

⁴ *Littlefield v. Littlefield*, 51 Wis. 23.

⁵ *City of Natchez v. Vandervelde*, 31 Miss. 706; 66 Am. Dec. 581.

⁶ *Houston v. Mathews*, 1 Yerg. 116; *Betts v. Brown*, 3 Mo. App. 20; *Ambler v. Cox*, 20 N. Y. Sup. Ct. 295.

⁷ *Jackson v. Van Corlaer*, 11 Johns. 123; *Boyd v. Graves*, 4 Wheat.

§ 159. Parol exchange.—A parol exchange of lands is subject to the same rules as a parol sale, and specific performance will be decreed when there has been part performance.¹ Where two parties enter into an agreement whereby one agrees to exchange his land for the other's and a sum of money, and the former has wholly performed his agreement and the latter has partly performed his, the former is entitled to a decree for specific performance, aside from the question whether the memorandum of agreement was made in compliance with the statute of frauds.²

§ 160. Erection of improvements.—The erection of improvements by a vendee under a parol contract is one of the most unambiguous acts of part performance by which the contract may be removed from the statute.³ The improvements must be of such a character that the

513; *Lindsay v. Springer*, 4 Har. (Del.) 547; *Jackson v. Dysling*, 2 Caines, 198; *Fuller v. County Commrs.*, 15 Pick. 81; *Blair v. Smith*, 16 Mo. 273; *Kip v. Norton*, 12 Wend. 127; 27 Am. Dec. 120; *Adams v. Rockwell*, 16 Wend. 285; *Yarborough v. Abernathy*, Meigs, 413; *Davis v. Townsend*, 10 Barb. 333, McCoun, J., dissenting; *Waterman on Specific Performance*, § 278. See, also, *Gilchrist v. McGee*, 9 Yerg. 455; *May v. Baskin*, 12 Smedes & M. 428; *Carroway v. Anderson*, 1 Humph. 61.

¹ *Moss v. Culver*, 64 Pa. St. 414; 3 Am. Rep. 601; *Reynolds v. Hewett*, 27 Pa. St. 176; *Johnston v. Johnston*, 6 Watts, 370; *Caldwell v. Harrington*, 9 Peters, 86; *Beebe v. Dowd*, 22 Barb. 255; *Bennett v. Abrams*, 41 Barb. 619; *Parrill v. McKinley*, 9 Gratt. 1; 58 Am. Dec. 212; *Miles v. Miles*, 8 Watts & S. 135. See *Ryan v. Tomlinson*, 39 Cal. 639.

² *Bigelow v. Armes*, 108 U. S. 10.

³ *O'Neill v. Martin*, 26 Kan. 494; *Crook v. Corporation of Seaford*, Law R. 6 Ch. 551; 10 Eq. 678; *Drum v. Stevens*, 94 Ind. 181; *Williams v. Evans*, Law R. 19 Eq. 547; *Newton v. Swazey*, 8 N. H. 9; *Wells v. Stradling*, 3 Ves. 378; *Savage v. Foster*, 5 Vin. Abr. 524, pl. 43; *Stockley v. Stockley*, 1 Ves. & B. 23; *Sutherland v. Briggs*, 1 Hare, 26; *Toole v. Medicott*, 1 Ball & B. 393; *Mundy v. Jolliffe*, 5 Mylne & C. 167; *Surcome v. Pinniger*, 3 De Gex, M. & G. 571; *Annan v. Merritt*, 13 Conn. 478; *Dugan v. Colville*, 8 Tex. 126; *Grant v. Ramsey*, 7 Ohio St. 157; *Blackney v. Ferguson*, 3 Eng. 272; *Casler v. Thompson*, 3 Green Ch. 59; *Mason v. Wallace*, 3 McLean, 148; *Stater v. Hill*, 10 Ind. 176; *Mortimer v. Orchard*, 2 Ves. 243; *Wheeler v. D'Esterre*, 2 Dow, 359; *Norris v. Jackson*, 10 Week. R. 228; *Kidder v. Barr*, 35 N. H. 236; *Mims v. Lockett*, 33 Ga. 9; *Williston v. Williston*, 41 Barb. 635; *Hoffman v. Fett*, 39 Cal. 109; *Green v. Finin*, 35 Conn. 178; *Cummings v. Gill*, 6 Ala. 562; *Despain v.*

existence of a contract for the sale of the property might naturally be inferred from their erection; and the party making them must have done so on the faith of the contract.¹ This is but a statement of the same rule that applies to the transfer of possession when claimed as part performance. When, therefore, such relations exist between the owner and the person making the improvements that the existence of a contract of sale is not a natural and probable inference, the erection of improvements alone will not avail as part performance. A contract would not necessarily be inferred, for example, in a case where the improvements were made by a son on land owned by his father.²

Carter, 21 Mo. 331; Neatherly v. Ripley, 21 Tex. 434; School District v. Macloon, 4 Wis. 79; Wilson v. West H. Ry. Co., 2 De Gex, J. & S. 475; Wilton v. Harwood, 23 Me. 133, 134; Miller v. Tobie, 41 N. H. 84; Massey v. McIlwain, 2 Hill Ch. (S. C.) 421; Finucane v. Kearney, Freem. (Miss.) 65; Outenhouse v. Burleson, 11 Tex. 87; Johnson v. McGruder, 15 Mo. 365; Blunt v. Tomlin, 27 Ill. 93; Mason v. Blair, 33 Ill. 194; Wetmore v. White, 2 Caines Cas. 87, 109; 2 Am. Dec. 323; Adams v. Rockwell, 16 Wend. 285; Moreland v. Lemasters, 4 Blackf. 383; Brock v. Cook, 3 Port. 464; Harder v. Harder, 2 Sand. Ch. 17; Martin v. McCord, 5 Watts. 493; 30 Am. Dec. 342; Syler v. Eckhart, 1 Binn. 378; Simmons v. Hill, 4 Har. & McH. 252; 1 Am. Dec. 398; Shirley v. Spencer, 4 Giln. 583; Brock v. Cook, 3 Port. 464; Edwards v. Fry, 9 Kan. 417; Clayton v. Frazier, 33 Tex. 91; Gregg v. Hamilton, 12 Kan. 333; Johnson v. Bowden, 37 Tex. 621; Howe v. Rogers, 32 Tex. 218; Freeman v. Freeman, 43 N. Y. 34; 3 Am. Rep. 657; Patterson v. Copeland, 52 How. Pr. 460; Perkins v. Hadsell, 50 Ill. 216; Ingles v. Patterson, 36 Wis. 373; Thornton v. Henry, 2 Scam. 218; Kelley v. Stanberry, 13 Ohio, 408; Haines v. Haines, 6 Md. 435; Vickers v. Sisson, 10 W. Va. 12; Tracy v. Tracy, 14 W. Va. 243; Morin v. Martz, 13 Minn. 191; Underhill v. Williams, 7 Blackf. 125; Shepherd v. Bevin, 9 Gill, 31; Jamison v. Dimock, 95 Pa. St. 52; Farley v. Stokes, 1 Sel. Eq. Cas. (Pa.) 422. But see Barnes v. Boston etc. R. R. Co., 130 Mass. 388; Hibbert v. Aylott, 52 Tex. 530; Ballard v. Ward, 89 Pa. St. 358; Irwin v. Dyke, 114 Ill. 302; Anderson v. Shockley, 82 Mo. 250; Drum v. Stevens, 94 Ind. 181; Potter v. Jacobs, 111 Mass. 32; Montgomery v. Carlton, 56 Tex. 361; Bard v. Elston, 31 Kan. 274; Ballard v. Ward, 89 Pa. St. 358; Littlefield v. Littlefield, 51 Wis. 23; Halsey v. Peters, 79 Va. 60; Tracy v. Tracy, 14 W. Va. 243.

¹ Hamilton v. Jones, 3 Gill & J. 127; Byrne v. Romaine, 2 Edw. Ch. 445; Carlisle v. Fleming, 1 Har. (Del.) 421; Peckham v. Barker, 8 R. I. 17; Spaulding v. Congelman, 30 Mo. 177; Wood v. Thornly, 58 Ill. 464.

² Eckert v. Eckert, 3 Pa. 332; Haines v. Haines, 6 Md. 435.

§ 161. **Nature of improvement.**—The improvements must be permanent and of such a nature that damages would not afford compensation.¹ Performance or a willingness and readiness to perform must be shown on the part of the vendee, although possession has been delivered and improvements erected.² Where a father made an oral agreement to buy for his son a tract of land in consideration of his relinquishing his intention to depart from the State, and a sum of money that was offered to him to go with, and the father had the deed made out in his own name, but the son entered upon the land and made both temporary and permanent improvements, it was held that the heirs of the son were entitled to a conveyance.³ And so where under a parol agreement between a father and son that the former should convey land to the latter, the title to vest at the father's death, the fact that payment of the purchase money was made by five years' labor, and that the son took possession and made permanent improvements, is sufficient to entitle the son to a decree of specific performance, and this right is unaffected by the fact that the father paid the taxes and received each year one-third of the crop.⁴

§ 162. **Compensation for improvements.**—If through any infirmity in the contract it cannot be specifically enforced, the vendee will be entitled to the repayment of the purchase money and compensation for the improve-

¹ *Dougan v. Blocher*, 24 Pa. St. 28. See also *O'Reilly v. Thompson*, 2 Cox, 271; *South Wales R. R. Co. v. Wythes*, 1 Kay & J., 186; *Easton v. Easton*, 61 Tex. 225.

² *Simmons v. Hill*, 4 Har & McH. 259; 1 Am. Dec. 398. Purchase money must be paid or tendered: *Holmes v. Holmes*, 44 Ill. 168; *McClellan v. Darrah*, 50 Ill. 249. But see *King v. Thompson*, 9 Peters, 204; *Haines v. Haines*, 6 Md. 435. See *Brown v. Jones*, 46 Barb. 400; *McCoy v. Hughes*, 1 Greene, 370. Where possession was taken and improvements made, but against the vendor's objection until the payment of the purchase money, specific performance was enforced: *Potter v. Jacobs*, 111 Mass. 32; *Zimmerman v. Wengert*, 31 Pa. St. 401; *Northrop v. Boone*, 66 Ill. 368; *Miller v. Ball*, 64 N. Y. 286.

³ *Bohanan v. Bohanan*, 96 Ill. 591.

⁴ *McDowell v. Lucas*, 97 Ill. 489.

ments, with a deduction of the amount of the rents and profits.¹ And, as against the vendor and creditors, it is held that the vendee has a lien upon the land for his improvements.² But it seems he has not the right to retain possession until compensation has been made to him for his improvements.³ Clearing up the land, or bestowing labor and skill upon its cultivation, will be considered as the making of improvements.⁴ Where an owner of land three days after making a parol agreement to convey it, died, leaving three minor children, and the vendee subsequently entered upon the land and made valuable improvements, it was held that the performance of this parol agreement, notwithstanding the failure to give notice to the vendee by the children not to make the improvements, would not be enforced against them.⁵ If the purchaser has entered into possession and erected valuable improvements upon the faith of his purchase, and the contract is of such a nature that specific performance cannot be decreed, the vendor, it is true, may be forced to refund the purchase money and to pay the actual value of the improvements. But to enable the purchaser to recover, he must himself be free from fault, and the failure to decree specific performance must be by reason of some defect in the contract or noncompliance with the statute of frauds.⁶ If the purchaser fails to maintain his right of

¹ *Fox v. Longly*, 1 Marsh. A. K. 388; *Lord Pengall v. Ross*, 2 Eq. Cas. Abr. 46, pl. 12; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Dunn v. Moore*, 3 Ired. Eq. 364; *Harden v. Hays*, 9 Pa. St. 151; *Baker v. Carson*, 1 Dev. & B. Eq. 381; *Albea v. Griffin*, 2 Dev. & B. Eq. 9; *Goodwin v. Lyon*, 4 Port. 297; *Evans v. Battle*, 19 Ala. 398; *Ridley v. McNairy*, 2 Humph. 174; *Ackerman v. Ackerman*, 24 N. J. Eq. 315; *Avermeyer v. Koerner*, 32 P. F. Smith (Pa.), 517; *Deisher v. Stein*, 34 Kan. 39.

² *Rucker v. Abell*, 8 Mon. B. 566; 48 Am. Dec. 406.

³ *Harden v. Hays*, 9 Pa. St. 151. See *West v. Flannagan*, 4 Md. 36. The improvements must have been a benefit to the property and a sacrifice to the party by whom they were made: *Gangwer v. Fry*, 17 Pa. St. 491; 55 Am. Dec. 578; *Moote v. Scriven*, 33 Mich. 500.

⁴ *Patterson v. Copeland*, 52 How. Pr. 460; *McCarger v. Rood*, 47 Cal. 38; *Morrison v. Peay*, 21 Ark. 110. See *Harder v. Harder*, 2 Sand. Ch. 19.

⁵ *Ryan v. Wilson*, 56 Tex. 36.

⁶ *Chabot v. Winter Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192.

action because of his own laches, negligence, and general disregard of his duties, and not because of any technical defect in the form of the contract, he is not entitled to recover for the improvements made by him.¹

§ 163. Benefit from the use of the land.—As it is said that the statute must prevail in all cases except when it would be a fraud on a party not to enforce specific performance, it is interesting to inquire what the result will be when the advantages or benefits received or realized by a party in possession from the rents, issues, and profits, equal or exceed the value of the improvements placed on the land by him. It may be said that as the party has been fully compensated for all loss and damage he has sustained by his possession, labor, and improvements, there should be no ground for a departure from the statute.

§ 164. One view.—On one hand, the rule is laid down that compensation is never permitted in cases of this character to excuse the performance. The reason given is, that the party has so far executed his portion of the contract, that he is entitled to an execution of it, and compensation in place of this execution is not what he contracted to have. In the language of the court: "All the courts require is proof of the agreement, and that it has been so far partly executed as to let the purchaser into the possession under it, and that he has made valuable improvements on the land, and a performance will be decreed. To allow parties in avoidance of this rule to go farther and inquire whether injury has in fact resulted, or whether the corresponding benefits already received have not fully compensated for the change of possession and improvements, in order to bring the case back within the operation of the statute, would be to inaugurate an entirely new rule on this subject, and add greatly to the complication of this already embarrassing question, and would be wholly changing the rights of the party un-

¹ Chabot v. Winter Park Co., 34 Fla. 258; 43 Am. St. Rep. 192.

der the agreement. Such an inquiry would always arise in those cases where a bare possession is relied upon to take the case out of the statute, and that has always been held to be sufficient for that purpose, yet the inquiry never has been gone into, or, if so, has universally been disallowed by the courts."¹

§ 165. **Opposite view.** — On the other hand, it is asserted that when compensation has been made to a purchaser for his improvements, or where his receipts by virtue of his possession more than balance his expenditures for improvements, they will not avail him as a ground for specific execution.²

§ 166. **Comments.** — We think the true rule to be that when a party has made improvements, the court will properly refuse to enter into a speculation as to the value of the improvements; or attempt to solve the question whether the purchaser has or has not been fully compensated by the rents and profits derived from the use of the land. One cogent reason that may be given for this view is that if this is not the true rule, and the relation of landlord and tenant did not exist, it would follow that the purchaser is a trespasser. The vendor under these circumstances would, hence, be himself legally entitled to the profits. The decisions of the courts in Pennsylvania show a strong inclination to disregard the entire doctrine of part performance; and it is extremely doubtful whether these decisions would be regarded as authority elsewhere. By one author it is said that, "it is, however, well settled that possession alone without payment or other acts of ownership, is sufficient part performance of a verbal contract for land to sustain a decree for its specific execution."³

¹ *Mims v. Lockett*, 33 Ga. 9, 17.

² *Ann Berta Lodge v. Levertton*, 42 Tex. 18; *Eckert v. Eckert*, 3 Pa. 332; *Eason v. Eason*, 61 Tex. 225; *Wack v. Sorber*, 2 Whart. 387; 30 Am. Dec. 269; *Ash v. Daggy*, 6 Port. (Ind.) 259.

³ *Browne on Statute of Frauds*, § 467. And see the same authority,

§ 167. Parol contract for conveyance of land between parent and child.—It requires stronger and more convincing evidence to establish a contract between a parent and child, or between others bearing a similar family relation, than it does to prove a contract between strangers.¹ Therefore, it is not a proper inference, in the absence of other evidence, that the land was given to the son by the father, from the circumstances that the son went into possession, made improvements, and paid the taxes; nor is sufficient evidence of a gift supplied by loose declarations of the father that the land was his son's

§ 469. See, also, 2 Story's Eq. Juris., § 761; 2 Greenl. Cruise, tit. 32, ch. 3, 32, 33.

¹ *Poorman v. Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 425; *Eckert v. Mace*, 3 Pen. & W. 364. See, also, *Shellhammer v. Ashbaugh*, 83 Pa. St. 24; *Sower v. Weaver*, 84 Pa. St. 262; *King v. Thompson*, 9 Peters, 204. In *Poorman v. Kilgore*, *supra*, the court say: "We may notice still another principle of law that is applied very beneficially to restrain the exception to the statute, and which is of especial importance in this case, though its application is not peculiar to cases under this statute. We allude to the law of evidence that grows out of the family relation. It is so usual and natural for children to work for their parents even after they arrive at age, that the law implies no contract in such cases; and it is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books, or utensils, or rooms, or houses, by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to the children as against each other, and in subjection to their own paramount right. The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it and nothing else. The importance of this rule is very apparent, for it requires but a glance over the cases of this class to discover how sad has been the experience of the courts in family disputes growing out of the exceptions which have been allowed to this statute, and how many and how distressing must have been the ruptures of the closest ties of kindred that have been produced and perpetuated by the encouragement thus given to try the experiment of extracting legal obligations out of acts of parental kindness."

property.¹ But while it requires stronger evidence to constitute proof, yet when the contract is satisfactorily shown, it will, if sufficient equitable considerations exist, be enforced as in other cases. A verbal agreement was made by a father to convey to his son, a minor, a tract of land, if the son would remain with him and work for him until he attained his majority. The son continued in his employment until he had passed his majority, when the father renewed the promise and caused the land to be transferred on the tax-list to the son, who relying on his father's promise took possession of the land and made valuable improvements. The father dying without executing a conveyance, a specific performance of the contract was decreed.²

§ 168. Consideration.—It is held that a son must be a purchaser for a valuable consideration, or have suffered some inconvenience, to entitle him to enforce a parol executory agreement to convey. And hence, where a promise is made by a father to devise certain lands to his son, the fact that the latter makes improvements, but not in consequence of the agreement, does not relieve the case from the operation of the statute.³

§ 169. Acts not considered part performance.—Having referred to the acts which are deemed a part performance, we now pass to the consideration of those which are not considered sufficient to take a case out of the opera-

¹ *Hugus v. Walker*, 26 Pa. St. 356; *Cox v. Cox*, 26 Pa. St. 375; 67 Am. Dec. 432.

² *Atkinson v. Jackson*, 8 Ind. 31. See *Young v. Glendenning*, 6 Watts, 509; 31 Am. Dec. 492; *Lobdell v. Lobdell*, 36 N. Y. 327; *Moore v. Pierson*, 6 Iowa, 279; 71 Am. Dec. 409; *Bright v. Bright*, 41 Ill. 101; *Hardesty v. Richardson*, 44 Md. 617; 22 Am. Rep. 57; *Galbraith v. Galbraith*, 5 Kan. 402; *Twiss v. George*, 33 Mich. 253; *Syler v. Eckhart*, 1 Binn. 378; *Willis v. Mathews*, 46 Tex. 478; *McCray v. McCray*, 30 Barb. 633; *France v. France*, 8 N. J. Eq. 650; *Shepherd v. Bevin*, 9 Gill, 32. Where an agreement was made by a father to convey in return for his support and maintenance, it was on account of part performance specifically enforced: *Davison v. Davison*, 13 N. J. Eq. 246. See, also, *Law v. Henry*, 39 Ind. 414; *Forward v. Armistead*, 12 Ala. 124; 46 Am. Dec. 246.

³ *McClure v. McClure*, 1 Pa. St. 374.

tion of the statute. A court of equity will not enforce a contract when reliance is placed solely upon such part performance as consists of acts done anterior to the contract.¹ These acts are not performed in execution of the agreement, and they are, in most cases, done by one party without the knowledge of the other. Where a vendor had verbally agreed with his vendee to convey the land when the latter obtained a release from a third person, and he did so, paying a large sum for it, it was held that this was not part performance, but simply an act preparatory to the agreement.² Under a parol agreement for the sale of land, the vendor had drawn the deeds and written to the vendee that they were ready, and requested him to complete the transaction; the vendee had deposited part of the purchase money with his agent, to be paid to the vendor upon the execution of the deeds, and the vendor had been so informed by the agent; and finally the vendee had taken possession of the land without the vendor's permission. But these acts were not considered as constituting part performance.³ The making of a lease by a purchaser who had previously bound himself to lease the premises to a third person is not part performance.⁴ And generally, such acts as are merely ancillary, or preparatory to the contract, as delivering abstracts of title, giving instructions for the drawing of leases or convey-

¹ *Parker v. Smith*, 1 Colly. C. C. 608, 623; *Dougan v. Blocker*, 12 Harris, 28; *Eckert v. Eckert*, 3 Pa. 332.

² *O'Reilly v. Thompson*, 2 Cox, 271. Where a surveyor agrees to search for swamp lands in consideration of receiving a portion of them for his services, the rendition of such services by the surveyor is not such part performance that the contract will be enforced: *Edwards v. Estell*, 48 Cal. 194. See, also, *North v. Forest*, 15 Conn. 400.

³ *Givens v. Calder*, 2 Desaus. Eq. 171; 2 Am. Dec. 686; *Reeves v. Pye*, 1 Cranch, 219. See *Townsend v. Hawkins*, 45 Mo. 286. Where plaintiff had contributed his professional services toward the acquisition of defendant's title, under an agreement for a conveyance of a portion of it as his compensation, and defendants were insolvent and claimed the land as exempt from execution, specific performance was decreed: *Chastain v. Smith*, 30 Ga. 96. See, also, *Gosden v. Tucker*, 6 Munf. 1; *Livingston v. Livingston*, 2 Johns. Ch. 537.

⁴ *Whitchurch v. Bevis*, 2 Bro. C. C. 559. See *Whaley v. Bagnell*, 1 Brown Parl. C. 345.

ances, visiting, examining, or measuring the land, appraising the value of the land, executing conveyances which the vendee had not accepted, are not considered as constituting part performance.¹

§ 170. Payment of money merely is not part performance.—At one time it was held that the payment of a part of the purchase money would take the case out of the statute.² Subsequently the opinion prevailed that while payment of a small portion of the purchase price would not operate as part performance, yet the payment of a considerable part of it would be so considered.³ But it is now settled law that the mere payment of the purchase money is not such an act of part performance as will entitle the vendee to the specific execution of a parol contract for the sale of land.⁴

¹ *Cole v. White*, cited 1 Bro. C. C. 409; *Whitbred v. Brockhurst*, 1 Bro. C. C. 412; *Redding v. Wilkes*, 3 Bro. C. C. 400; *Clerk v. Wright*, 1 Atk. 12; *Hawkins v. Holmes*, 1 P. Wms. 770; *Pembroke v. Thorpe*, 3 Lev. 437, n; *Cooke v. Tombs*, 2 Anstr. 420; *Montacute v. Maxwell*, Strange, 236; *Popham v. Eyre*, Lofft, 786; *Cooth v. Jackson*, 6 Ves. 12, 17, 41; *Frame v. Dawson*, 14 Ves. 386; *Stokes v. Moore*, 1 Cox, 219; *Earl of Glengall v. Barnard*, 1 Keen, 769; *Thynne v. Earl of Glengal*, 2 Clark & F., N. S., 131; *Phillips v. Edwards*, 33 Beav. 440; *Gratz v. Gratz*, 4 Rawle, 441; *Smith v. Smith*, 1 Rich. Eq. 130, 138.

² *Lacon v. Mertins*, 3 Atk. 4; *Wetmore v. White*, 2 Caines' Cases in Error, 109; 2 Am. Dec. 323.

³ *Main v. Melbourn*, 4 Ves. 720; *Child v. Comber*, 3 Lev. 423, n. See *Wills v. Stradling*, 3 Ves. 378; *Simmons v. Cornelius*, 1 Ch. Rep. 241; *Sueden on Vendors*, ch. 8, § 3. In *Townsend v. Houston*, 1 Har. (Del.) 532, 27 Am. Dec. 732, payment of a substantial portion of the purchase money, it was held, may constitute part performance: See *Thompson v. Tod*, 1 Peters C. C. 488; *Spear v. Orendorf*, 26 Md. 37.

⁴ *Townsend v. Fenton*, 32 Minn. 482; *Neal v. Gregory*, 19 Fla. 356; *Parker v. Wells*, 6 Whart. 153; *Peckham v. Balch*, 49 Mich. 179; *Hood v. Bowman*, Freem. (Miss.) 290; *Townsend v. Fenton*, 30 Minn. 528; *O'Herlihy v. Hedges*, 1 Schoales & L. 129; *Alsopp v. Patten*, 1 Vern. 472; *M'Kee v. Phillips*, 9 Watts, 85; *Hughes v. Morris*, 2 De Gex, M. & G. 356; *Cole v. Potts*, 2 Stockt. Ch. 67; *Ham v. Goodrich*, 33 N. H. 32, 39; *Smith v. Smith*, 1 Rich. Eq. 130, 132, 135; *Purcell v. Miner*, 4 Wall. 513; *Garner v. Stubblefield*, 5 Tex. 581. See, also, *Leake v. Morris*, 2 Ch. Cas. 135; *Lord Pengall v. Ross*, 2 Eq. Cas. Abr. 46, pl. 12; *Coles v. Trecothick*, 9 Ves. 234; *Jackson v. Cutright*, 5 Munf. 303, 308; *Malhi v. Lassabe*, 4 Ala. 712; *Black v. Black*, 15 Ga. 445; *Hart v. McClellan*, 41 Ala. 251;

§ 171. **Reasons for this rule.**—One reason assigned for this rule is that the money may be repaid, and the parties thus restored to their former situation.¹ Another reason advanced is that as part payment renders a verbal sale of goods binding, it is to be presumed that the omission of any such provision concerning the sale of real estate shows an intention that such a payment shall not have this effect.² But perhaps the best reason is that the payment of money by itself is not such an act as will “put the party into a situation which is a fraud upon him, unless the agreement is fully performed.”³

§ 172. **When payment of money part performance.**—But where a recovery of money paid by the party on the

Dugan v. Colville, 8 Tex. 126; *Netherly v. Ripley*, 21 Tex. 434; *Blanchard v. McDougal*, 6 Wis. 167; 70 Am. Dec. 458; *Wood v. Jones*, 35 Tex. 64; *Smith v. Finch*, 8 Wis. 245; *Parke v. Leewright*, 20 Mo. 85; *Workman v. Guthrie*, 29 Pa. St. 495; 72 Am. Dec. 654; *Lanz v. McLaughlin*, 14 Minn. 72; *Blodge v. Hildreth*, 103 Mass. 424; *Odell v. Montross*, 68 N. Y. 499; *Cogger v. Lansing*, 43 N. Y. 559; *Kidder v. Barr*, 35 N. H. 235; *Thompson v. Gould*, 20 Pick. 134; *Glass v. Hulburt*, 102 Mass. 24; 3 Am. Rep. 418; *Eaton v. Whitaker*, 18 Conn. 222, 229, 44 Am. Dec. 586; *Allen's Estate*, 1 Watts & S. 383, 389; *Rankin v. Simpson*, 19 Pa. St. 471; 57 Am. Dec. 668; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Wilber v. Paine*, 1 Hamm. (Ohio), 252; *Sites v. Keller*, 6 Hamm. (Ohio), 483; *Lewis v. Montgomery etc. Assn.* 70 Ala. 276; *Cronk v. Trumble*, 66 Ill. 428; *Letcher v. Cosby*, 2 Marsh. A. K. 106; *Baker v. Wiswell*, 17 Neb. 52; *Felton v. Smith*, 84 Ind. 485; *Wood v. Jones*, 35 Tex. 64; *Kelly v. Kelly*, 54 Mich. 30; *Forrester v. Flores*, 64 Cal. 24; *Ann Berta Lodge v. Leverton*, 42 Tex. 18; *Temple v. Johnson*, 71 Ill. 13; *Suman v. Springate*, 67 Ind. 115; *Fraser v. Gates*, 118 Ill. 99. But see the cases in Iowa and Delaware, where payment in full is regarded as being sufficient to entitle a party to specific performance: *Mau v. Jackman*, 58 Iowa, 359; *Franklin v. Tuckerman*, 68 Iowa, 572; *Stein v. Mysonger*, 69 Iowa, 512; *Miller v. Nelson*, 64 Iowa, 458; *Townsend v. Houston*, 1 Har. (Del.) 532; 27 Am. Dec. 732. If payment and other acts are relied upon, those other acts must be of such a character that a refusal to execute the agreement would be a fraud upon the purchaser: *Horn v. Ludington*, 32 Wis. 73. See, also, *Wilson v. Chicago etc. R. R. Co.*, 41 Iowa, 443. The insolvency of the vendor does not add to the right for specific performance: *Townsend v. Fenton*, 32 Minn. 482.

¹ *Neal v. Gregory*, 19 Fla. 356; *Olinan v. Cooke*, 1 Schoales & L. 22, 41. See *Mialhi v. Lassabe*, 4 Ala. 710.

² *Pomeroy on Specific Performance*, § 113 n.

³ *Story's Eq. Juris.*, § 761; *Temple v. Johnson*, 71 Ill. 13.

contract will not restore him to his former situation, payment of the purchase money may be considered an act of part performance.¹ Thus, where a purchaser agreed to buy land of an owner on condition that a mortgagee should discharge a mortgage upon the land, and there was a verbal agreement between all three that the mortgagee should receive a part of the consideration to be paid on the purchase, and that he should, at the same time, release the mortgaged premises, and, on the completion of the purchase, the purchaser paid the consideration money of which the mortgagee received the agreed sum, but declined to execute a release, he was compelled by the court, notwithstanding the statute, to do so.²

§ 173. Part performance by marriage.—"The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own ground."³ But where there are other independent acts

¹ *Malins v. Brown*, 4 N. Y. 403; *Morgan v. Milman*, 3 De Gex, M. & G. 35, per Lord Cranworth; *Rhodes v. Rhodes*, 3 Sand. Ch. 279; *German v. Machin*, 6 Paige Ch. 288; *Van Duyne v. Vreeland*, 1 Beasl. 142, 151; *Hill v. Gomme*, 1 Beav. 541; *Davison v. Davison*, 2 Beasl. 246.

² *Malins v. Brown*, 4 N. Y. 403. See, also, *Nunn v. Fabian*, Law R. 1 Ch. 35; *Farwell v. Johnston*, 34 Mich. 342. But it has been held that the fact that the grantor is insolvent does not alter the rule: *Townsend v. Fenton*, 32 Minn. 482. When payment is accompanied by taking possession or making improvements or similar acts, it will authorize specific performance: *Woodbury v. Gardner*, 77 Me. 68; *Jamison v. Dimock*, 95 Pa. St. 52; *Fitzsimmons v. Allen*, 39 Ill. 440; *Griffith v. Abbott*, 56 Vt. 356; *Felton v. Smith*, 84 Ind. 485; *Day v. Cohn*, 65 Cal. 508; *Walker v. Owen*, 79 Mo. 563; *Anderson v. Shockley*, 82 Mo. 250; *Davison v. Davison*, 13 N. J. Eq. 246; *Armes v. Bigelow*, 3 MacArthur (D. C.), 442; *Green v. Jones*, 76 Me. 563; *Gupton v. Gupton*, 47 Mo. 37; *Bechtel v. Cone*, 52 Md. 698; *Marsh v. Davis*, 33 Kan. 326; *McClure v. Otrich*, 118 Ill. 320; *Tibbs v. Barker*, 1 Blackf. (Ind.) 58; *Bigelow v. Armes*, 108 U. S. 10; *Wendell v. Stone*, 39 Hun, 382; *Watson v. Mahan*, 20 Ind. 223.

³ *Story's Eq. Juris.* § 768. See *Montacute v. Maxwell*, 1 P. Wms. 613; *Taylor v. Beech*, 1 Ves. Sr. 297; *Dundas v. Dutens*, 1 Ves. Jr. 199; *Redding v. Wilkes*, 3 Bro. C. C. 400; *Warden v. Jones*, 23 Beav. 487; *Lassence v. Tierney*, 1 Macn. & G. 551; *Finch v. Finch*, 10 Ohio St. 501;

of part performance, and though they are connected with marriage, yet marriage is not relied upon as the only act; a parol agreement will be enforced as in other cases.¹ Thus, the taking of possession and the erection of improvements by the husband and wife are a sufficient part performance of a verbal promise before marriage by the father of the husband to convey land to the wife in consideration of the contemplated marriage.²

Worley v. Walling, 1 Har. & J. 208. But see *Dugan v. Gittings*, 3 Gill, 138; 43 Am. Dec. 306.

¹ *Hammersly v. De Biel*, 12 Clark & F. 45, 64; *Surcome v. Pinniger*, 3 De Gex, M. & G. 571; *Ungley v. Ungley*, Law R. 4 Ch. D. 73; *Neale v. Neale*, 9 Wall. 1; *Gough v. Crane*, 3 Md. Ch. 119.

² *Neale v. Neale*, 9 Wall. 1.

CHAPTER VII.

THE FORMAL PARTS OF THE DEED.

PART I.

FORM OF THE DEED, GENERALLY.

- § 174. Form of the deed, generally.
- § 175. Statutory forms.
- § 176. Enumeration of the formal parts.

PART II.

THE DATE OF THE DEED.

- § 177. Date not necessary to the validity of a deed.
- § 178. Presumption of delivery at date.
- § 179. Different view—Presumption of delivery from acknowledgment.
- § 180. Comments.
- § 181. Language of the courts.
- § 182. Presumption not conclusive.

PART III.

NAMES AND DESCRIPTION OF THE PARTIES.

- § 183. Objects to be attained in naming the parties.
- § 183a. Identity of name.
- § 184. Designation of grantee by description.
- § 185. Use of common name.
- § 186. Uncertainty of grantee.
- § 187. Where the grantee is dead.
- § 188. Signature by wrong name.
- § 189. Description sufficient if no uncertainty.
- § 190. The grantee named must be capable of holding.
- § 191. Fictitious grantee.
- § 192. Mistake in name of corporation.
- § 193. Extrinsic testimony to remedy uncertainty.
- § 194. Necessity for stating name of grantor in deed.
- § 195. Rule in New Hampshire that signature alone is sufficient.
- § 196. Rule in United States courts that party not bound unless named in the deed.
- § 197. Same rule in Massachusetts.
- § 198. Same rule in Maine.
- § 199. In Ohio.
- § 200. In Alabama.

- § 201. In Indiana.
- § 201 a. In Texas.
- § 202. In Mississippi.
- § 203. In California.
- § 204. Comments.
- § 205. Christian name.
- § 206. Mistake in Christian name.
- § 207. Designation "junior."
- § 208. Deeds to partners.
- § 209. Ascertaining intended grantee.
- § 210. Further description of the parties.

PART IV.

THE GRANTING WORDS.

- § 211. An intention to convey should be shown.
- § 212. Nature of the deed.

PART V.

THE HABENDUM.

- § 213. The *habendum* not an essential part of a deed.
- § 214. Repugnance between granting words and *habendum*.
- § 215. Qualification of previous grant.
- § 215 a. When *habendum* controls.
- § 216. Not the province of *habendum* to introduce new subject matter into the grant.
- § 217. Reference to *habendum*.
- § 218. Explanatory clause.
- § 219. Party not named as grantee taking under *habendum*.
- § 220. Effect of the *habendum* to limit the estate.

PART VI.

THE REDDENDUM.

- § 221. What is, and when used.
- § 222. What is necessary for a good *reddendum*.

PART VII.

THE TESTIMONIUM CLAUSE.

- § 223. General use of the *testimonium* clause.
- § 224. Relinquishment of the right of dower.

PART I.

FORM OF THE DEED, GENERALLY.

§ 174. Form of the deed, generally.—No particular form is required to constitute a deed. All that is essential may be expressed in very brief language. Lord Coke remarked that if a deed of feoffment be without premises,

habendum, tenendum, reddendum, clause of warranty, etc., it is still a good deed; "for if a man by deed give land to another and to his heirs without more saying, this is good if he put his seal to the deed, deliver it, and make livery accordingly."¹ Chancellor Kent, referring to this, observes: "In the United States, generally, the form of a conveyance is very simple. It is usually by bargain and sale, and possession passes *ex vi facti* under the authority of the local statute, without the necessity of livery of seisin, or reference to the statute of uses. . . . I apprehend that a deed would be perfectly competent, in any part of the United States, to convey the fee, if it was to be to the following effect: 'I, A B, in consideration of one dollar to me paid by C D, *do bargain and sell* [or in New York, grant] to C D, and his heirs [in New York, Virginia, etc., the words *and his heirs* may be omitted], the lot of land [describe it]; witness my hand and seal,' etc. But persons usually attach so much importance to the solemnity of forms, which bespeak care and reflection, and they feel such deep solicitude in matters that concern their valuable interests to make 'assurance double sure,' that generally in important cases the purchaser would rather be at the expense of exchanging a paper of such insignificance of appearance for a conveyance surrounded by the usual outworks, and securing respect, and checking attacks, by the formality of its manner, the prolixity of its provisions, and the usual redundancy of its language. The English practice and the New York practice, down to the present time, have been in conformity with the opinion of Lord Coke, that it is not advisable to depart from the formal and orderly parts of a deed which have been well considered and settled."²

¹ Co. Litt. 7 a.

² 4 Kent's Com. 461. In *Cross v. Weare Commission Co.*, 153 Ill. 499, 46 Am. St. Rep. 902, it is said, per Magruder, J: "It is not essential that the instrument of conveyance should follow any exact or prescribed form of words, provided the intention to convey is expressed. To make a conveyance valid it is sufficient, in general, that there be parties able to contract and be contracted with, a proper subject matter sufficiently

§ 175. **Statutory forms.**—Attempts have been made to attain simplicity and brevity in deeds by legislation. Thus, in England, by a statute made to facilitate the conveyance of real property, a short form of conveyance is given together with a technical and redundant form; and the statute declares that the short form shall have the same effect as the other.¹ In many of the American states, short forms of conveyance have been given, which are declared effectual to pass the title to real property; and in some states, the mere naming of the several covenants has the same effect by statute as the insertion of the covenants themselves at length.² The use of these forms is not made obligatory, and though they have not always been practically adopted, they mark a return to the simplicity observed by the ancient Saxons. "The Saxons, in their deeds, observed no set form, but used honest and perspicuous words to express the thing intended with all brevity, yet not wanting the essential parts of a deed, as the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservation, and the names of the witnesses."³

described, a valid consideration, apt words of conveyance, and an instrument of conveyance duly sealed and delivered." "The employment of words sufficient to show a purpose and intent to convey," said the court in another case, "is all that was required, either by the statute or common law. No precise technical words are required to be used in creating a conveyance; the use of any words which amount to a present contract of bargain and sale is sufficient. Whatever may be the inaccuracy of expression, or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the title can be discovered the courts will give effect to it and construe the words accordingly." In *Harlowe v. Hudgins*, 84 Tex. 107; 31 Am. St. Rep. 21.

¹ 8, 9 Vict. ch. 119.

² In California, for instance, the form of conveyance authorized by statute is as follows: "I, A B, grant to C D all that real property situated in [insert name of county] County, State of California, bounded [or described] as follows [here insert description]; or if the land sought to be conveyed has a descriptive name, it may be described by the name, as for instance, 'The Norris Ranch.' Witness my hand this [insert day] day of [insert month], 18—. A B." Civ. Code. § 1092.

³ Sir Henry Spellman's Works, by Bishop Gibson, p. 234.

§ 176. **Enumeration of the formal parts.**—The formal parts of a deed consist of the premises, the *habendum*, the *tenendum*, the *reddendum*, the conditions, the warranty, the covenants, and the conclusion. All that is contained in a deed preceding the *habendum* is understood to be included in the *premises*, embracing the names of the parties, such recitals as may be deemed necessary, the statement of the consideration, and a description of the property conveyed. Certain topics, such as description, covenants, consideration, recitals, etc., which might be spoken of in this chapter, will be considered elsewhere separately.

PART II.

THE DATE OF THE DEED.

§ 177. **Date not necessary to the validity of a deed.**—The validity of a deed is not affected by the failure to insert a date, as it becomes operative from its delivery and not from its date. The date, however, is *prima facie* evidence of the time of the execution of the deed.¹ “The date is no part of a deed and not necessary to be inserted. The real date of a deed is the time of its delivery.”² It is immaterial in what part of the deed the date is placed. In a deed preserving the form of an indenture, it is generally inserted at the commencement, and in one having the form of a deed-poll in the testimonium clause. In a case in which the date in the body of the deed differed from one in the foot by exactly a year, the latter was considered as the true date of the deed.³ A deed which requires to be executed by several grantors is considered as dated when executed by the last grantor.⁴

¹ *Meech v. Fowler*, 14 Ark. 29; *Lyerly v. Wheeler*, 11 Ired. 290; 53 Am. Dec. 414; *Newlin v. Osborne*, 4 Jones (N. C.), 157; 67 Am. Dec. 269; *Costigan v. Gould*, 5 Denio, 290; *Colquhoun v. Atkinson*, 6 Muni. 550; *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638.

² Kent, C. J., in *Jackson v. Schoonmaker*, 2 Johns. 230, 234..

³ *Morrison v. Caldwell*, 5 Mon. 426; 17 Am. Dec. 84.

⁴ *Kurtz v. Hollingshead*, 4 Cranch C. C. 180.

§ 178. Presumption of delivery at date—It frequently becomes necessary in the case of conflicting deeds from the same grantor to determine when each became operative. They, of course, are supposed to take effect from delivery. But when the time of actual delivery is doubtful, resort must be had to presumption. And the presumption in cases of this kind, it may be stated as a general rule, is that a deed is delivered at its date. "As a general principle a deed does not take effect from its date, but from its delivery; but the presumption is, it was delivered on the day of its date, and the date may be contradicted as not essential to its operation. It is always competent to show that the date inserted in a deed was not the date of its delivery."¹ And although the deed may not be acknowledged until long afterward, yet the date of the deed will be presumed, in the absence of proof to the contrary, to be the true date of its execution.²

§ 179. Different view.—Presumption of delivery from acknowledgment.—This rule, however, is not universally

¹ Mr. Justice Breese in *Blake v. Fash*, 44 Ill. 302; *Gordon v. City of San Diego*, 108 Cal. 264; *Faulkner v. Adams*, 126 Ind. 459; *Ellsworth v. Central R. R. Co.*, 34 N. J. L. 93; *Seibel v. Rapp*, 85 Va. 28; *Robinson v. Wheeler*, 25 N. Y. 252; *People v. Snyder*, 41 N. Y. 397; *Ferguson v. Bond*, 39 W. Va. 561; *Harden v. Osborne*, 60 Ill. 93; *Bellings v. Stark*, 15 Fla. 297; *Egery v. Woodard*, 56 Me. 45; *Jayne v. Gregg*, 42 Ill. 413; *Wheeler v. Single*, 62 Wis. 380; *Raines v. Walker*, 77 Va. 92; *Harvey v. Alexander*, 1 Rand. 219; 10 Am. Dec. 519; *Meech v. Fowler*, 14 Ark. 29; *Eaton v. Trowbridge*, 3 Mich. 454; *Deininger v. McConnell*, 41 Ill. 227; *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151; *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Harmon v. Oberdorfer*, 33 Gratt. 497. And this may be shown by parol evidence: *Sweetser v. Lowell*, 33 Me. 446.

² *Darst v. Bates*, 51 Ill. 439; *Billings v. Stark*, 15 Fla. 297; *Ellsworth v. Central R. R. Co.*, 34 N. J. L. 93; *McConnell v. Brown*, Litt. Sel. Cas. 459; *Jayne v. Gregg*, 42 Ill. 413; *Ford v. Gregory*, 10 Mon. B. 175; *Sweetser v. Lowell*, 33 Me. 446; *Harris v. Norton*, 16 Barb. 264; *Purdy v. Coar*, 109 N. Y. 448; 4 Am. St. Rep. 491; *McMichael v. Carlyle*, 53 Wis. 504; *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514; 46 Am. St. Rep. 355; *Gordon v. City of San Diego*, 108 Cal. 264; *Raines v. Walker*, 77 Va. 92; *Harden v. Crate*, 78 Ill. 533; *Deininger v. McConnell*, 41 Ill. 227; *Harman v. Oberdorfer*, 33 Gratt. 497; *Smith v. Porter*, 10 Gray, 66; *Dresel v. Jordan*, 104 Mass. 407.

accepted, and in some States the acknowledgment is taken as the time of presumptive delivery. In a Missouri case, the court said: "A deed is not generally executed till it is acknowledged, and till that takes place there will be no presumption of delivery."¹ In the case cited one deed "was dated July 10, 1835, and acknowledged and recorded on the succeeding day, the 11th of the same month." The other "was dated, acknowledged, and recorded on the 11th of July, 1835, the same day on which the acknowledgment and recording of the first deed took place." The court said: "Both acknowledgments were taken before the same officer, and the natural presumption is that they were both delivered and recorded at the same time, and that they constituted one and the same transaction. That the first deed was dated one day prior in point of time, will make no difference."² And in Michigan, where there was no proof of the delivery of a deed prior to its acknowledgment, and it was acknowledged on a day subsequent to its date, it was presumed to have been delivered after acknowledgment. The decision was placed upon the ground that such was the usual course and practice in regard to the delivery of deeds and other instruments intended for record.³ So in Iowa, it is presumed that the delivery of a deed was made at the date of the acknowledgment, in the absence of any showing as to the precise time at which a deed was delivered;⁴ and in Maine likewise.⁵ Even if a deed is presumed to have been delivered at its date, this presumption will be greatly strengthened if it is also acknowledged on the same day.⁶

¹ *Fontaine v. Boatmen's Savings Institution*, 57 Mo. 55, 2561.

² *Fontaine v. Boatmen's Savings Institution*, 57 Mo. 552, 561.

³ *Blanchard v. Tyler*, 12 Mich. 339; 86 Am. Dec. 57. See, also, *Clark v. Akers*, 16 Kan. 166; *Eaton v. Trowbridge*, 38 Mich. 454; *Henry Co. v. Bradshaw*, 20 Iowa, 355; *Loomis v. Pingree*, 43 Me. 299; *Ford v. Gregory*, 10 B. Mon. 175; *Breckenridge v. Todd*, 3 T. B. Mon. 52; 16 Am. Dec. 83.

⁴ *County of Henry v. Bradshaw*, 20 Iowa, 355.

⁵ *Loomis v. Pingree*, 43 Me. 299, 308.

⁶ *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552.

§ 180. **Comments.**—But though the presumption that a deed was delivered at the time it bears date does not prevail in the states enumerated in the previous section, we regard it as the proper and general rule. Deeds are frequently delivered before they are acknowledged. The want of acknowledgment or delay in making it may be due to various causes. The parties themselves may not desire to have the deed recorded until some period subsequent to its date, and may either wish to keep the conveyance secret, or may consider an acknowledgment before the time at which it is to be recorded as unnecessary. The deed may be executed in a place where no officer, entitled to take an acknowledgment, resides, and the inconvenience and difficulty of finding such an officer at a distance may cause delay in the acknowledgment. Or perhaps, in some cases, the parties may not be aware that in order to secure to the grantee full protection against subsequent purchasers and encumbrancers, the deed should be acknowledged and recorded. Then, again, in determining what the proper presumption should be, there is another consideration. Acknowledgment was not necessary at common law, and if there were no statutes relative to acknowledgment, the date of the deed would have to be taken as the time at which delivery would be presumed, and this presumption manifestly must be adopted when the deed is not acknowledged at all. Indeed, the statutes providing for the acknowledgment of deeds seem to assume that a deed has been delivered before it may be acknowledged. These statutes provide a mode of proving the *execution* of instruments, and execution includes delivery. Of course, as a matter of fact, deeds are sometimes, and perhaps very often, not delivered until after they have been acknowledged. But as a matter of presumption the date of the deed should, in the opinion of the author, be accepted in the absence of countervailing evidence as the time of delivery.

§ 181. **Language of the courts.**—This question has been in some cases elaborately discussed, and the conclu-

sions announced have been attained by a careful consideration of all the arguments that may be advanced on one side or the other. We deem it proper in this connection to bring to the attention of the reader the language of the court, in cases in which this question has arisen and been decided. In a case in Massachusetts, Mr. Justice Merrick said, in delivering the opinion of the court: "All deeds and contracts ought regularly to be dated on the day of their execution. This is important for a great variety of purposes. The rights of the contracting parties are not unfrequently made to depend upon an accurate statement of time. Accordingly, it is found by experience that in the prudent management of affairs this rule is commonly recognized as useful and observed with care. And this being at once the usual and proper manner of conducting a transaction of this kind, it may well be considered reasonable and safe to conclude, in any particular instance, where there is no other evidence upon the subject, that any legal instrument by which property is conveyed was completed on the day on which it bears date. The principle, *omnia presumuntur rite acta*, is not confined merely to official proceedings, or the doings of public bodies, but has been extended to acts of private individuals, especially when they are of a formal character, as writings under seal."¹ "It is of little importance that the deed was not acknowledged on the same day on which it purports to have been executed, but on the 17th of January, 1846. It is well known that in this commonwealth the title to land, followed by a corresponding seisin and possession, often passes by instruments of conveyance which are not duly acknowledged; and accordingly the law will not allow a title to fail on account of such an omission, but has made suitable provision for supplying the defect of an acknowledgment where it is found to exist."² "The delivery of a deed is always presumed to have been made on the day of its date, and its subse-

¹ Smith v. Porter, 10 Gray, 68; citing 1 Phil. Ev. (8th ed.) 470.

² Smith v. Porter, 10 Gray, 66, 68.

quent acknowledgment does not change this presumption; but the delivery may be proved to have occurred at a different time.”¹ The presumption that the delivery of a deed was made at its date prevails in California;² also in Kansas.³ This presumption is accepted, and the rule has been incorporated in California into the Civil Code, which declares that “a grant duly executed is presumed to have been delivered at its date.”⁴

§ 182. Presumption not conclusive.—This is but a presumption, however, and cannot avail when there is a positive averment in the acknowledgment that the deed was executed after its date;⁵ and it may always be overcome by proof.⁶ The date is no indication of the time of the actual execution of the deed, when it appears that the deed was antedated, and the date therefore was not the true one.⁷ In a case where the date of the deed was prior in point of time to that written upon a revenue stamp placed on the deed, it was held that the presumption was that the deed was delivered at the time of the cancellation of the stamp.⁸

PART III.

NAMES AND DESCRIPTION OF THE PARTIES.

§ 183. Objects to be attained in naming the parties.—The names of the parties should be so given that the individuals intended may be readily distinguished. And whenever such designation has been used that this may be accomplished, there is a sufficient description of the parties, though the name employed be not the true one, or even if none be used at all. When the name of the

¹ *Ford v. Gregory*, 10 Mon. B. 175, 180, per Justice Simpson.

² *Treadwell v. Reynolds*, 47 Cal. 171.

³ *Clark v. Akers*, 16 Kan. 166, 171.

⁴ Cal. Civ. Code, § 1055.

⁵ *Henderson v. Baltimore*, 8 Md. 353.

⁶ *Elsey v. Metcalf*, 1 Denio, 323.

⁷ *Costigan v. Gould*, 5 Denio, 290.

⁸ *Van Rensselaer v. Vickery*, 3 Lans. 57.

grantee in a deed is asserted to be erroneous, and there is such a person as the one named, it may be shown by parol evidence who was really intended as the grantee. Thus, the court allowed a deed to "Hiram Gowing" to be shown as intended for "Hiram G. Gowing," and not to his son, whose name was "Hiram Gowing."¹ But it is requisite that there be a designation in the deed, in some manner, of the persons intended as parties to it.²

§ 183 a. Identity of Name.—If a deed is made to a married woman in her maiden name, it is valid when shown that she was the grantee intended.³ Where the

¹ *Peabody v. Brown*, 10 Gray, 45. And see *Scanlan v. Wright*, 13 Pick. 523, 530; 25 Am. Dec. 344, where it is said: "As to the deed being made to the female petitioner, by the name which she bore before her marriage, we think it is the common case of a person known by different names. She bore the name of Eliza A. Castin till her marriage, and it appears that she was the person intended and understood by the grantor; that he used the name by which he had known her, and by which she had always been known till her marriage, and it does not appear that her marriage and change of name were known to Bishop Fenwick, who conveyed the estate to her in execution of a trust. We think it was no violation of the rule, which rejects parol evidence when offered to contradict or control a deed, to show that the petitioner was the person to whom the grant was made; that she was, in fact, known by her maiden name to some persons, and especially to the grantor, and that there was no other person claiming to bear the name used in the deed, or claiming title under it."

² *Chase v. Palmer*, 29 Ill. 306. In that case, a deed without the name of the grantee when it was executed and acknowledged was held invalid. There must be a grantee named: *Whittaker v. Miller*, 83 Ill. 381. Where title is claimed by deed from the mother of certain heirs, and conveyances to her from the minor heirs are introduced describing them as the heirs of one deceased, it is necessary to prove their identity as such heirs, as the recitals in the deed to that effect are insufficient for that purpose: *Wolf v. Holton*, 104 Mich. 107; 62 N. W. Rep. 174. Where a deed purports to be made by a person as executor, and is signed by him in the same form, it sufficiently shows that he executed it in his representative capacity: *Babcock v. Collins*, 60 Minn. 73; 51 Am. St. Rep.

³ *Wilkerson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803. If a woman to whom a devise is made as "S. M.," subsequently conveys the property as "S. B.," describing herself as formerly "S. M.," it is not necessary to prove her identity, as her marriage will be presumed: *Dowdy v. McArthur*, 94 Ga. 577.

grantor is described as a resident of a certain county in one State, and the grantee is living in another State, described as of a certain county "in said State," the mistake cannot affect the rights of the grantee.¹ A misnomer in a deed may be cured by execution and acknowledgment.² The names of "K. F. Redmond" and "K. F. Redman" are not *idem sonans*, but are presumed to refer to different persons. Hence, where the title is vested in a person under the name of K. F. Redmond, a deed signed by K. F. Redman does not convey a title to a vendee that an intending purchaser from such vendee is compelled to accept, and the execution of a subsequent deed by Redman, reciting that he obtained title thereto under the name of K. F. Redmond, and that his name was misspelled, and that he is the same person to whom the deeds were executed under the name of K. F. Redmond, does not, of itself, remedy the apparent defect in the title.³ Identity in names of grantor or grantee will be taken *prima facie* as evidence of identity of persons.⁴ Where a person is named in the body of the deed, and in the certificate of acknowledgment, as "Archibald T. Finn," and the signature to the deed is "Arch. T. Finn," it will be presumed that the same person is designated.⁵ In an action at law it may be shown by parol evidence that the name "Mercy A. Andrews," describing a grantee, was intended for "Melissa A. Andrews," who produced the

¹ *Stewart v. Sutherland*, 93 Cal. 270. A deed signed and acknowledged by "Samuel S. Jenkins" is not invalidated because the grantor's name is written in one part of the deed as "Samuel S. Jones," such error being manifestly made by the conveyancer: *Jenkins v. Jenkins*, 148 Pa. St. 216.

² *Ballard v. Carmichael*, 83 Tex. 355; 17 S. W. Rep. 393.

³ *Peckham v. Stewart*, 97 Cal. 147.

⁴ *Rupert v. Penner*, 35 Neb. 587. A deed to "Ashbald Green of New York," and a deed by "Ashbel Green of the Township of Palisades, in the county of Bergen, and State of New Jersey," will be presumed to have been made to and by the same person: *Tillotson v. Webber*, 96 Mich. 144; 55 N. W. Rep. 837.

⁵ *Rupert v. Penner*, 35 Neb. 587. See, also, *Auerbach v. Wylie*, 84 Tex. 615.

deed, and who received it on execution.¹ A deed naming husband and wife as parties of the second part, but not referring to the wife in any of the granting or operative clauses, passes title to the husband alone.² A grantor was named in the body of the deed as "Robert P. McClintock," and the deed was signed "R. Parker McClintock," and acknowledged by Robert P. McClintock, but it was held that both names indicated the same person.³ The names "Strambler" and "Stramler" are *idem sonans*, and, where a deed is made to a person under one of these names, and he conveys it by another, the question of personal identity is one for the jury, and the fact that different members of the same family spell their name either way, indifferently, may be shown in evidence.⁴ It may be shown by parol evidence that "Eugene J. Gannon," the grantor in a deed, is the person described as "Joseph E. Ganñon" in a devise of the land.⁵ A person who purchases land, and gives a mortgage back, notwithstanding variances in name, will be treated as the same person.⁶ The record showed that the title to a certain piece

¹ *Andrews v. Dyer*, 81 Me. 104. But it cannot be shown by parol that the grantor, by mistake, executed and delivered the deed to the wrong person: *Whitmore v. Learned*, 70 Me. 276; *Crawford v. Spencer*, 8 Cush. 418.

² *Boyertown Nat. Bank v. Hartman*, 147 Pa. St. 558; 30 Am. St. Rep. 759; *Ott v. Oyer's Executor*, 106 Pa. St. 17.

³ *Grand Tower Min. M. & T. Co., Gill*, 110 Ill. 541.

⁴ *Galveston N. & S. A. Ry. Co. v. Stealy*, 66 Tex. 468.

⁵ *Skinker v. Haagsma*, 99 Mo. 208.

⁶ *McDuffie v. Clark*, 9 N. Y. Supp. 826. A deed reciting the receipt of the consideration from two parties, but making no further mention of one of them, either in the granting clause or in the *habendum*, although blank spaces have been left, apparently, for some other name, conveys no title to the person whose name is so omitted: *Hardin v. Hardin*, 34 S. C. 77; 27 Am. St. Rep. 786. A deed was made to "Harriet N. Andrews." A deed was executed by "Harriet Andrews" and her husband, but in the body of this latter deed she was described as "Harriet N. Andrews," and in each was described as resident of the same place, and it was decided that identity sufficiently appeared: *Olow v. Plummer*, 85 Mich. 550. For other cases construing deeds, where there has been variance in names of parties, see *Bay v. Posner*, 78 Md. 42; *Jackson v. Roberts*, 95 Ky. 410; *Lyman v. Gedney*, 114 Ill. 388; 55 Am. Rep. 871;

of real estate was in Joel S. Smith. A deed purporting to convey this property, and in its recitals and also in the acknowledgment designating the grantor as "Joel S. Smith," was signed "John S. Smith," and the court held it not to be competent evidence to prove a conveyance of the title of Joel S. Smith, in the absence of other proof establishing the fact that the persons who signed the deed, John S. Smith and Joel S. Smith, were one and the same.¹ If other things are equal, and there is no evidence to the contrary, it will be presumed, where both father and son bear the same name, that the father is the grantee.²

§ 184. Designation of grantee by description.—The fact that a grantee is not described by name will not affect the validity of a deed, if the designation or description be sufficient to distinguish the person intended from the rest of the world. Thus, where a conveyance was made to Margaret W. Pitcher and her children, and to their heirs and assigns forever, it was declared that the number of children *in esse* could be ascertained, and the maxim would apply, *id certum est quod certum reddi potest*.³ A deed is valid which is made to the heirs at law of a person deceased.⁴ But a deed made to heirs of a living person, without specifying the names of the heirs so called, is void, because it is left in uncertainty who are to have the benefit of the conveyance.⁵

Ramage v. Ramage, 27 S. C. 39; *Tillotson v. Webber*, 96 Mich. 144; *Bennett v. Green*, 74 Cal. 425.

¹ *Omaha Real Estate & Trust Co. v. Kragcow*, 47 Neb. 592.

² *Doty v. Doty*, 159 Ill. 46; *Graves v. Colwell*, 90 Ill. 612.

³ *Hamilton v. Pitcher*, 53 Mo. 334. The court held that she and her children *in esse* took as tenants in common. A deed to "P or her heirs" was held good: *Hogan v. Page*, 2 Wall. 607; *Ready v. Kearsley*, 14 Mich. 225.

⁴ *Boone v. Moore*, 14 Mo. 420; *Shaw v. Loud*, 12 Mass. 447. And see *Thomas v. Marshfield*, 10 Pick. 364, 367.

⁵ *Morris v. Stephens*, 46 Pa. St. 200; *Winslow v. Winslow*, 52 Ind. 8; *Hall v. Leonard*, 1 Pick. 27; *Outland v. Bowen*, 115 Ind. 150; 7 Am. St. Rep. 420; *Tinder v. Tinder*, 131 Ind. 381. "A deed conveying property is not void for uncertainty if it can be shown who were intended, and

§ 185. **Use of common name.**—The description of a person by the name by which he is generally and commonly known is sufficient, though this name may be different from that of his baptism.¹ In a case in Michigan, where there was some uncertainty to the name of the grantee, the court observed: "It is undoubtedly true that to constitute a valid conveyance, the grant must, in some way, distinguish the grantee from the rest of the world. But it is equally true, that if upon a view of the whole instrument he is pointed out, even though the name of baptism is not given at all, the grant will not fail. The whole writing is always to be considered, and the intent will not be defeated by false English, or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties through the means furnished by the whole document, and such intrinsic aids as the law permits. It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is, if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee, it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument."²

that they were in life, and capable of taking at the time the deed was executed": *Hogg v. Odom*, Dud. (Ga.) 185. In that case the conveyance was to the "children of Nancy Jones." The word "heirs" has not always been taken in its technical sense, but when it appears that the term was used to designate a class has been extended to embrace children or apparent heirs: *Fountain Co. Com. Co. v. Beckleheimer*, 102 Ind. 76; 52 Am. Rep. 645; *Tucker v. Tucker*, 78 Ky. 503; *Brann v. Elzly*, 83 Ky. 440; *Tinder v. Tinder*, 131 Ind. 381.

¹ *Counden v. Clerke*, Hob. 32 a. See, also, *Erskine v. Davis*, 25 Ill. 251; *Garwood v. Hastings*, 38 Cal. 217. Title will not pass to a grantee named in the clause reciting the receipt of the consideration, but not named in the granting or *habendum* clause: *Hardin v. Hardin*, 32 S. C. 599.

² *Newton v. McKay*, 29 Mich. 1, 2, per Graves, O. J. The instrument in question was in this form: "Jacob Sammons and wife to F. H. Generaux. This indenture made and agreed to between Jacob Sammons of

§ 186. **Uncertainty of grantee.**—The grantee must be either mentioned by name, so that it can be known at once who is the person intended, or he must be described by terms sufficiently definite to enable his identity to be ascertained. Uncertainty as to the person intended as grantee, as for instance where a grant is made to a “neighborhood,” will render a deed void.¹ A deed in which no grantee is mentioned, but which is given “for use of schoolhouse, if the neighboring inhabitants see cause to build a schoolhouse thereon,” cannot, for the lack of necessary parties, operate either by way of grant or estoppel.²

§ 187. **Where the grantee is dead.**—A deed naming as grantee a man who is dead at the time of its execution is a nullity. And if the word “heirs” be added, title will not be conveyed to the persons coming under that classification, as the term is not one of purchase carrying title

the first part, and F. H. Genereaux of the second part, both of Michigan, and the county of Mackinaw, witnesseth, that the said party of the first part, for and in consideration of the sum of fifty dollars to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged and confirmed, this first day of May, one thousand eight hundred and fifty-two, do grant, bargain, sell, and convey, and does by these presents bind his heirs, executors, administrators, and assigns, all that certain tract or parcel of land being and known as lot number forty-one (41), in the village of Cheboygan, together with all and singular the appurtenances thereunto belonging, for himself, his heirs, and assigns, to have and to hold forever, and will warrant and defend against whomsoever. In testimony whereof we have hereunto set our hands and seals the day and year above written. Jacob Sammons, Chloe Ann Sammons. Signed, sealed, and delivered in presence of W. A. Barr, William A. Rice.” The court considered that the paper was prepared and executed as an idle ceremony, and that from the use of the expressions “of the party of the first part,” and “party of the second part,” it might be gathered from the instrument who was intended as grantee.

¹ *Thomas v. Marshfield*, 10 Pick. 364, 367. See *Jackson v. Sisson*, 2 Johns. Cas. 321; *Reformed Dutch Church v. Veeder*, 4 Wend. 494. But if the grantee is described in such a manner that he can be readily identified, the deed is valid: *Gillespie v. Rogers*, 146 Mass. 610; *Jones v. Morris*, 61 Ala. 518; *McKee v. Spiro*, 107 Mo. 452; *Payne v. Mathis*, 92 Ala. 585.

² *Bailey v. Kilburn*, 10 Met. 176; 43 Am. Dec. 423. But it may create a trust: *Bailey v. Kilburn*, *supra*.

to them, but is employed as a qualification of the title of the grantee.¹

§ 188. **Signature by wrong name.**—A conveyance is not invalidated by the fact that the grantor signs it by a wrong name if his true name is recited in the body of the deed, and he also acknowledges it by his true name.² Between the parties, a conveyance of property by the owner by any name will transfer the title. And when executed in a different name from that in which he acquired title, it will, when recorded, operate as constructive notice of the transfer of title, and will be entitled to precedence over a deed to the same land executed in the name by which title to it was acquired, but subsequently recorded.³ In all cases where there is a substantial similarity in sound, a slight variance in the orthography will be disregarded. Thus, the name of a patentee was written James Emonds, and in the deed in which he was grantor, he signed his name James Emmens or Emmons, it did not clearly appear which, but the variance was considered immaterial.⁴ Between the grantor and grantee title will pass, although the grantor signs by an assumed name, or the scrivener makes a mistake in his name.⁵

¹ *Hunter v. Watson*, 12 Cal. 363, 376; 73 Am. Dec. 543. A deed made to "Abner Dunn Deceased Estate" is void for want of a grantee: *McInerney v. Beck*, 10 Wash. 515. See, also, *Simmons v. Spratt*, 22 Fla. 370.

² *Middleton v. Findla*, 25 Cal. 76.

³ *Fallon v. Kehoe*, 38 Cal. 44; 99 Am. Dec. 347. In California, it is now provided by statute that, "any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, shall in any conveyance of said real estate so held, set forth the name in which he or she derived title to said real estate": *Stats. Cal.* 1873-74, pp. 345, 346.

⁴ *Lyon v. Kain*, 36 Ill. 362. But see *Heil & Lauer's Appeal*, 40 Pa. St. 453; 80 Am. Dec. 590.

⁵ *Wakefield v. Brown*, 38 Minn. 361; 8 Am. St. Rep. 671. In that case the court said: "If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title, and in all cases evidence *aliunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies terms already contained in it: 3 Washburn on Real

§ 189. **Description sufficient if no uncertainty.**—If the description of the grantees is such that no uncertainty can arise, it will be sufficient, as where a conveyance is made “to the trustees” of an unincorporated association. This is a sufficient designation, although the names of the trustees are not mentioned.¹ So where a grantor conveyed land by deed to “an association of persons,” without specifying the names of all of the persons who were members of the association at the date of the deed, the court will determine who were members of the association at the time of the execution of the deed, and will decide as to the interest taken by each member of the association in the land so conveyed.² When a corporation is contemplating a change of its existing name, it may take by the name it intends to assume in the future.³ If, at the time a deed is executed and acknowledged, the name of the grantee is not inserted in the deed, but is inserted before delivery, and the deed is delivered either by the grantor himself or by some one else at his direction, the deed in its completed form must be regarded as adopted by him.⁴ But the legal title will not pass by a deed duly signed and acknowledged by the grantor, if,

Property, 281; *Hommel v. Devinney*, 39 Mich. 522; *Nixon v. Cobleigh*, 52 Ill. 387; *Lyon v. Kain*, 36 Ill. 362, 369; *Middleton v. Findla*, 25 Cal. 76, 81; *Fallon v. Kehoe*, 38 Cal. 44; 99 Am. Dec. 347; *Staak v. Sigelkon*, 12 Wis. 234; *Morse v. Carpenter*, 19 Vt. 613; *Fletcher v. Mansur*, 5 Ind. 267; *James v. Whitbread*, 11 Com. B. 406, 411; *Elliott v. Davis*, 2 Bos. & P. 338.” If one person subscribes the name of another to a deed, the latter by appearing before an officer and acknowledging the execution of the deed, recognizes and adopts the signature as his own to the same effect as if he had signed it: *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101.

¹ *Lawrence v. Fletcher*, 8 Met. 153, 163. And see *American Emigrant Co. v. Clark*, 62 Iowa, 182. Where a deed is made to the “Centenary M. E. Church,” with clauses of warranty to “the said the trustees of the Centenary M. E. Church,” the latter is the correct name of the corporation, the title passes to the corporation, the misnomer not being material: *Centenary M. E. Church v. Parker*, 43 N. J. Eq. 307; 12 Am. Rep. 142.

² *Pratt v. California Mining Co.*, 1 West C. Rep. 87; U. S. C. C. (Or).

³ *City Bank of Kenosha v. McClellan*, 21 Wis. 112.

⁴ *Lockwood v. Mapes*, 49 Mich. 546.

after the deed is delivered, the name of the grantee is inserted without any authority from the grantor. And in California, the fact that all distinctions between sealed and unsealed instruments are abolished does not affect this result.¹

§ 190. **The grantee named must be capable of holding.**—"A grant to be valid must be to a corporation, or some person certain must be named who can take by force of the grant, and who can hold either in his own right or as a trustee."² In the case from which the preceding quotation is taken, a deed to the people of a county was held void because the statute by which supervisors of counties were enabled to take conveyances of land applied only to conveyances made to them in their official name.³ Upon the ground that a voluntary unincorporated association has not the legal capacity to take or hold real property, and cannot, therefore, be the beneficiary of a trust, a deed to three persons in trust for it has been held void.⁴ But in Connecticut, in a very early case decided in 1795, a deed to a society's committee and their successors for

¹ *Arguello v. Bours*, 7 West C. Rep. 498; 67 Cal. 447.

² *Jackson v. Cory*, 8 Johns. 386, 388.

³ *Jackson v. Cory*, *supra*. See *Jackson v. Hartwell*, 8 Johns. 422; *Hornbeck v. Westbrook*, 9 Johns. 73; *North Hempstead v. Hempstead*, 2 Wend. 109; *Natchez v. Minor*, 17 Miss. 544; 48 Am. Dec. 727.

⁴ *German Land Association v. Scholler*, 10 Minn. 331. The court, per Wilson, C. J., said: "The German Land Association was not by the law invested with any legal existence, and the trust deed gives no intimation as to who the persons were associated under that name. The deed was, therefore, void." Speaking of grants for charitable uses the court said: "It is true that grants for charitable and pious uses have, by courts of equity, been sustained when made by trustees for the benefit of unincorporated institutions or associations, and when the *cestuis que trust* have been uncertain. The authorities in the United States are by no means harmonious as to the source or extent of the power of the courts in this class of cases; but it not being claimed that this grant is for charitable or pious uses, it is not necessary for us here to inquire as to the extent of the jurisdiction of courts of equities over charities, or whether it rests in the provisions of the statute of 43 Elizabeth, or exists where that statute is not in force."

the use of the society, seems to have been considered good.¹

§ 191. **Fictitious grantee.**—A patent issued to a person under an assumed name is not void, and a conveyance by such person under his assumed name will transfer title. But if issued to a person not in existence, the patent would be a nullity.² A grantee is as necessary to a deed as a grantor.³ A deed purporting to convey title to a corporation which has no existence is void.⁴ “A title by deed implies a contract, or at least competent parties. A deed to a person having no existence is generally inoperative and passes no title from the grantor. Even in the case of an escrow, the title remains in the grantor till the condition is complied with and the deed delivered, when it will relate back for certain purposes to the time when it was delivered by the grantor as an escrow. If a man grant his estate to an imaginary corporation which exists only in his own mind, no title passes, and it is precisely the same if it is granted to a corporation rendered incapable by its charter of taking the grant. As to that particular faculty it is not a corporation.”⁵

¹ *Judd v. Woodruff*, 2 Root, 298. A deed to “the members of the New Judson Church” is void: *Morris v. State* (Ala.), 4 So. Rep. 628. Where a deed is made to the trustees of an unincorporated society, it vests the title in them as individuals: *Douthitt v. Stinson*, 63 Mo. 268; *Brown v. Combs*, 29 N. J. L. 36; *Van Sant v. Roberts*, 3 Md. 119; *Austin v. Shaw*, 10 Allen, 552; *Hart v. Seymour*, 147 Ill. 598; *Bundy v. Birdsall*, 29 Barb. 31; *Bayley v. Onondago Co.*, 6 Hill. 476; 41 Am. Dec. 759; *United Brethren Church v. First Methodist Church*, 138 Ill. 608; *Reformed Dutch Church v. Veeder*, 4 Wend. 494.

² *Thomas v. Wyatt*, 31 Mo. 188; 77 Am. Dec. 640; *Dowing v. Bartels*, 2 West C. Rep. 506. If an owner of land executes a deed to a fictitious grantee, and subsequently, under the name of the fictitious grantee, executes a deed to another, the latter obtains a title: *David v. Williamsburgh etc. Ins. Co.*, 83 N. Y. 265; 38 Am. Rep. 418.

³ *United States v. Southern Col. etc. Co.*, 1 West C. Rep. 11 (U. S. C. C. Col.).

⁴ *Douthitt v. Stinson*, 63 Mo. 268.

⁵ Judge Drummond, in *Russell v. Topping*, 5 McLean, 194, 202. See *Harriman v. Southam*, 16 Ind. 190. A deed to a fictitious person is invalid: *Lillard v. Ruckers*, 9 Yerg. 64; *Muskingum Turnpike v. Ward*, 13 Ohio, 120; 42 Am. Dec. 191.

A deed to "L. R., etc., trustees of the Methodist Society, and to their heirs and assigns forever," was held to convey an absolute title to L. R., etc., named as grantees; and the words, "trustees of the Methodist Society," were considered *descriptio personæ*.¹ Where a corporation was duly organized by the legislature of the Territory of Nebraska, but its charter had not been approved by Congress, it was held that the corporation was one *de facto*, and could take title.² If the name of the grantee is not stated, or spelled correctly, he is considered as having adopted that name for the purpose of acquiring the title.³ A deed to or by a person under a fictitious name will convey the title, if he exists and can be identified.⁴

§ 192. **Mistake in name of corporation.**—A mistake in setting out the name of a corporation which is a party to a deed will not vitiate the deed, when it appears from its face that the corporation was intended.⁵ Where two persons answer the description in a deed, the one claiming under it is required to show that he is the person intended.⁶

§ 193. **Extrinsic testimony to remedy uncertainty.**—A patent, palpable uncertainty in the description of a

¹ Towar v. Hale, 46 Barb. 361. See, also, Austin v. Shaw, 10 Allen, 552; Brown v. Combs, 5 Dutch. 36.

² Smith v. Sheeley, 12 Wall. 361. To the same effect, see Myers v. Croft, 13 Wall. 295.

³ Blinn v. Chessman, 49 Minn. 140; 32 Am. St. Rep. 536.

⁴ Wilson v. White, 84 Cal. 239; David v. Williamsburgh etc. Ins. Co., 83 N. Y. 265; 38 Am. Rep. 418. See Garwood v. Hastings, 38 Cal. 216; Fallon v. Kehoe, 38 Cal. 44; 99 Am. Dec. 347.

⁵ Douglass v. Branch Bank at Mobile, 19 Ala. 659; Culpepper Society v. Digges, 6 Rand. 165; 18 Am. Dec. 708; President v. Meyers, 6 Serg. & R. 12; Society v. Varick, 13 Johns. 38; Aultman v. Richardson, 7 Neb. 1. A deed to an unincorporated company which enters into possession under it, passes a title which vests in the company when subsequently incorporated: Clifton Heights Land Co. v. Randell, 82 Iowa, 84. But as a general rule, a deed made to a named corporation not yet organized is a nullity: Harriman v. Southam, 16 Ind. 190; Douthitt v. Stinson, 63 Mo. 268; Russell v. Topping, 5 McLean, 195.

⁶ Grand Gulf R. R. & Banking Co. v. Bryan, 16 Miss. 234.

grantee in a deed cannot be remedied by the aid of extrinsic testimony. But where the uncertainty springs from the difficulty of determining to which of a number of individuals it was intended to apply, resort may be had to other facts and circumstances to ascertain the particular person intended by the grantor.¹

§ 194. Necessity for stating name of grantor in deed. Is it essential that a person should be mentioned in the deed to be bound by it, and to make it an operative conveyance of his estate? Suppose a deed is signed by a person who is not named in it as a grantor, is he bound? There is a marked contrariety of opinion upon this subject. In some of the States, it is considered that the naming of the grantor in the body of the deed is entirely unnecessary, and he is bound by a deed which he signs, but which does not contain his name in the premises, as firmly as if his name had been so written. In other States, the rule announced is that to bind a party the deed must contain apt words indicating an intent to bind him, and that his signature at the bottom of the deed, in which he is not named as grantor, cannot have the effect of making the conveyance operative against him. We shall proceed to inquire in what courts and States one or the other of these variant rules prevails.

§ 195. Rule in New Hampshire that signature alone is sufficient.—In New Hampshire, it was determined at an early day that if a person signs, seals, and delivers a deed, he is bound by the deed, though not named in it as grantor.² In a subsequent case in the same State, it was

¹ *Morse v. Carpenter*, 19 Vt. 613; *Aultman v. Richardson*, 7 Neb. 1; *Webb v. Den*, 17 How. 579.

² *Elliot v. Sleeper*, 2 N. H. 525. The court, per Woodbury, J., said: "It is said to be the province of the premises to name among other things both the grantor and grantee. So rigid has been the adherence to this rule, that it was long doubted whether a deed was valid, if the name of the grantor was omitted from the premises, although it appeared in the *habendum*: Co. Litt. 27 a, n. 4. But these doubts have been overruled (*Trethway v. Ellesdon*, 10 Mod. 46; *Lord Say and Seal's*

decided that where a deed of lands belonging to the wife purports to be the conveyance of the wife alone, and does not contain a recital that the husband is a party, but is executed by both husband and wife, it is the deed of both, and is operative to transfer the title of both to the land described in the deed.¹

Case, 3 East, 118; *Spyve v. Topham*, Allen, 38, 41; *Edes v. Lambert*, 2 Vent. 141), because every deed must, if possible, be made operative: *Langdon v. Gable*, 3 Lev. 22. And cases exist where almost every *formal* part of a deed has been dispensed with: *Shep. Touch.* 54; *Co. Litt.* 7 a; *Bridge v. Wellington*, 1 Mass. 219; *Com. Di. Faits*, E, 3. Indeed, writing, sealing, and delivery have been pronounced the only essentials. Here, however, a deed must by statute be attested; and since seals have ceased to be distinguished by peculiar devices, and education has become more generally diffused, signing would seem to be proper and indispensable. When a deed is signed, the utility of naming the grantor in the premises, or any part of the body of the instrument, appears in a great measure superseded, for 'know,' says Perkins, section 36, 'that the name of the grantor is not put in the deed to any other intent but to make certainty of the grantor': *Bac. Ab.* 'Grant' C. This certainty is attained whenever a person signs, seals, acknowledges, and delivers an instrument as his deed, though no mention whatever be made of him in the body of it, because he can perform these acts for no other possible purpose than to make the deed his own. In a deed-poll, like that under consideration, where only the grantor speaks, or signs, or covenants, there is still less danger of mistake and uncertainty concerning the party bound than in deed intended": *Storer v. Gordon*, 3 Maule & S. 322; *Gilly v. Copley*, 3 Lev. 139.

¹ *Woodward v. Seaver*, 38 N. H. 29. Perley, C. J., in delivering the opinion of the court, said: "In this case, Hannah I. Woodward owned the land, and in order to convey her right it was necessary that her husband should join with her in the conveyance; her separate deed would be void, and convey no title. The husband's name does not appear in the body of the deed, but there is a clause purporting to release Hannah I. Woodward's right of dower, and all her other rights in the premises, in which she is described as wife of the grantor. It therefore appears on the face of the deed that she was a married woman, and, consequently, that to give her conveyance effect it was necessary her husband should join in the deed. Her husband signed and sealed the deed. This would seem to bring the case very distinctly within the authority of *Elliot v. Sleeper*, 2 N. H. 525. In that case, as in this, the land belonged to the wife; the deed purported to be her sole conveyance, but was signed and sealed by her and her husband, and she is described as being the wife of Nathaniel Brown, who signed and sealed the deed. From this the court say it appears that it was necessary he should join with her in the conveyance. So it appears from the deed in the present case that Hannah I. Woodward was a married woman, and that to make

§ 196. **Rule in the United States courts that party not bound unless named in the deed.**—But by the Supreme Court of the United States, a different view from that which we have seen prevails in New Hampshire was expressed. An executory contract for the sale of property belonging to married women was signed and sealed by the husbands and wives jointly. The contract described them all as parties to it. Subsequently a deed was executed in compliance with this agreement for the sale of the land. The deed set forth that the husbands in right of their wives conveyed the premises, bargained by the contract of sale, to the grantees. The husbands and wives signed and sealed this deed jointly. They all acknowledged that they signed, sealed, and delivered the instrument as their act and deed. The married women acknowledged the execution of the deed separate and apart from their husbands. The court held the deed inoperative to convey the title of the married women to the land. “In the premises of this instrument,” said Mr. Chief Justice Taney, delivering the opinion of the court, “it is stated to be the indenture of their respective husbands in right of their wives of the one part, and of the grantees of the other part, the husbands and the grantees being specifically named, and the parties of the first part then grant and convey to the parties of the second part. The lessors of plaintiff are not described as grantors, and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey

her deed operative, it was necessary her husband should join in the conveyance. It has been lately decided, in *Burge v. Smith*, 27 N. H. 322, that where the wife signs and seals the deed of the husband, it is sufficient to bar her claim of dower, though no mention is made of her in the body of the deed, which is in some respects stronger than the present case, for the husband's deed is operative upon his own estate without the wife joining; but here the deed would be wholly void, unless it should be held that signing and sealing the deed made him a party to the conveyance. There is also less danger that the husband, who is in law *sui juris*, should part with his rights improvidently, than in case of the wife, whom the law supposes to be incapable of acting for herself”: And see, also, *Burge v. Smith*, 27 N. H. 332; *Gordon v. Haywood*, 2 N. H. 402.

by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument in which another person is grantor is not sufficient. The deed in question conveyed the marital interests of the husbands in these lands, but nothing more. It is unnecessary to inquire whether the acknowledgment of the *femes covert* is or is not in conformity with the statute of Mississippi. For, assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void.”¹ So it has been held that a deed of land executed by husband and wife, but which contains no words of grant by the wife, does not convey the latter’s estate in the land or bar her dower.² It was likewise held in one of the circuit courts, under the local law of Massachusetts, where a deed was executed by a husband and afterwards the wife signed and sealed the same deed, writing over her signature the words,

¹ *Agricultural Bank of Mississippi v. Rice*, 4 How. 225; *Batchelor v. Brereton*, 112 U. S. 396, 404.

² *Powell v. Monson & Brimfield Mfg. Co.*, 3 Mason, 347. Mr. Justice Story said: “The first question arises in respect to a parcel of land conveyed by Thomas Reddle to the husband of Mrs. Powell, in 1808. Reddle was seised of the land in right of his wife, who was owner of the fee, and she has signed and sealed the deed, but the husband alone is named as grantor in the deed, and there are words in the body of the deed containing a grant or release on her part. Under these circumstances, it is very clear that nothing passed by the deed but the life estate of Reddle; for, though by our local law, a wife, by joining with her husband in the deed, may convey her estate, yet the deed must contain apt words to make her a grantor, otherwise the deed conveys only the right of the husband. This point has been decided by the supreme court of the State, and in my humble judgment, with entire correctness: *Fowler v. Shearer*, 7 Mass. 14; *Lethgow v. Kavenagh*, 9 Mass. 161; *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56; *Lutkin v. Curtis*, 13 Mass. 223. We may then dismiss any further consideration on this point. The next question turns upon the same principle. Mrs. Powell signed and sealed certain deeds executed by her late husband, conveying certain parcels of

"I agree to the above conveyance," that such a conveyance did not release the wife's rights of dower in the premises described in the deed.¹

§ 197. **Same rule in Massachusetts.**—As indicated in the notes to the preceding section, the rule that a party is not bound by a deed unless he is named in it, also obtains in Massachusetts. In one case in that state, a lease was intended to be made to two persons named in the instrument. The persons named as lessees by the terms of the instrument promised to pay the rent, and engaged not to lease or underlet, nor permit any other person to occupy the demised premises without the written approbation of the lessor. One of the two persons named as lessees executed the instrument thus drawn, but the other did not. A third person, however, put his signature and seal to the lease with the one named in it as a party. The lessor brought suit for the rent against both of the signers of the lease, and the question before the court was whether they were jointly liable to the lessor on the instrument. The court held that they were not.² "The instrument," said the court, "was framed for a deed *inter partes*, and the intended parties were the plaintiff as lessor, and Cleaveland and Badger as lessees, and no others; and all the stipulations, express or implied, were intended to be made between those parties. Knous did not, by merely putting his name and seal to a paper containing stipulations expressed to be made between other parties, render himself liable to an action on the instrument for not fulfilling those stipulations, any more than he thereby acquired

the demanded premises in fee, but no words of relinquishment of her dower, or any other interest, are found in the deeds. The case, therefore, is precisely that of *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56, and *Lufkin v. Curtis*, 13 Mass. 223, where the court held that the deeds did not bar the wife of her dower, upon the plain reason that a deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound."

¹ *Hall v. Savage*, 4 Mason, 273. See, also, *Lane v. Dolick*, 6 McLean, 200, 203.

² *Hubbard v. Knous*, 3 Gray, 567.

a right to maintain an action on the instrument against the plaintiff for the plaintiff's breach of the stipulations on his part."¹ So, it has been held that a wife does not bar herself of her right of dower by signing and sealing a deed in which she is not mentioned as a party.² "A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case, whatever may be conceived of the intention of the demandant in signing and sealing the deed, there are no words implying her intention to release her claim of dower in the lands conveyed, which must have been, to give it that operation. It was merely the deed of the husband, and the wife is not by it barred of her right to dower."³ It has also been held in that state, under the statute relative to the conveyance of homesteads, that the wife does not join in the deed by simply inserting her name in the concluding clause of the deed, and by her signing and sealing the instrument.⁴ On the same principle it has been decided that the insertion of the name of a minor in the attestation clause of an instrument purporting to be an indenture of apprenticeship, and the execution of the instrument by such minor, are not sufficient to operate as a consent of the minor to make the instrument a valid indenture of apprenticeship under a statute requiring that "the consent of the minor shall be expressed in the indenture, and testified by signing the same."⁵ But a deed in the form, "I, Chas. T. Smith, and Ellen Smith, wife of said Charles," do hereby remise, release, etc., and signed by both, conveys the title of both.⁶

¹ *Hubbard v. Knous*, 3 Gray, 567, 568.

² *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56.

³ *Catlin v. Ware*, *supra*. See, also, *Leavitt v. Lamprey*, 13 Pick. 382; 23 Am. Dec. 685; *Lufkin v. Curtis*, 13 Mass. 223; *Bruce v. Wood*, 1 Met. 542; 35 Am. Dec. 380.

⁴ *Greenough v. Turner*, 11 Gray, 332. See *Wildes v. Vanvoorhis*, 15 Gray, 139.

⁵ *Harper v. Gilbert*, 5 Cush. 417. But it is held in New York that a father who signs, but is not named in an indenture of apprenticeship, is bound thereby: *Mead v. Billings*, 10 Johns. 99.

⁶ *Smith v. Carmody*, 137 Mass. 126.

§ 198. **Same rule in Maine.**—In Maine, the decisions in Massachusetts are followed upon this proposition, and it is settled that a party is not bound by a deed unless he is named in it as a grantor.¹ This question has arisen in cases when it has been claimed that the wife by joining in the execution of the deed relinquished her right of dower. But it is decided in Maine, that a wife by joining in a deed with her husband does not release her right of dower in the premises described in the deed, unless it contain apt words expressive of such an intention on her part; and that the insertion of the words “in token of her free consent,” in the conclusion of the deed, is not a sufficient expression of such intention.²

§ 199. **In Ohio.**—In Ohio, it is held that the title of a married woman, owner of fee in land, does not pass by a deed executed by husband and wife, unless she joins her husband in the granting part of the deed; and that though both husband and wife may have intended to execute a deed conveying the fee, a court of equity will not, as against the wife, rectify the mistake in the instrument of conveyance, and direct the execution of a perfect deed.³ “Had the husband,” said Mr. Justice Arcre, “when the deed was given, been the owner in fee simple, without any doubt, the title in fee would have passed. It is a deed precisely adapted to such a state of the title. It is the husband

¹ *Peabody v. Hewett*, 52 Me. 33; 83 Am. Dec. 486. Said Tenney, C. J. (p. 49): “According to 2 Blackst. Com. 297, the matter of a deed must be legally and orderly set forth; that is, there must be words sufficient to specify the agreement and bind the parties. It is not absolutely necessary in law to have all the formal parts that are usually drawn out in the deeds, so as there be sufficient words to declare clearly and legally the party’s meaning. In *Catlin v. Ware*, 9 Mass. 218, 6 Am. Dec. 56, it is said by the court, ‘a deed cannot bind a party making it, unless it contain words expressive of an intention to be bound.’ We think the instrument is not operative as a deed to convey the interest of William Peabody.”

² *Stevens v. Owen*, 25 Me. 94; *Lothrop v. Foster*, 51 Me. 367; *Payne v. Parker*, 10 Me. 178; 25 Am. Dec. 221. See *Frost v. Deering*, 21 Me. (8 Shep.) 156.

³ *Purcell v. Goshorn*, 17 Ohio, 105; 49 Am. Dec. 448.

alone that grants and conveys throughout the entire body of the deed; her name is never there mentioned but once, and then just as it would have been had the husband owned the land, and the wife possessed only a contingent dower interest. At the end of the deed the same appearance is kept up, and there the wife relinquishes her dower. Had the husband been the owner, then the conveyance would have been perfect, and the complainant would have needed no assistance from a court of chancery. Now by what principle can a court of equity take this deed, which is regular and perfect upon its face, drawn strictly according to the statute, to convey a fee by the husband and dower by the wife, and alter it, so that it shall convey a fee simple, instead of a dower interest by the wife. There is not a word of grant by the wife, nor anything equivalent to it in all the deed. This deed, by its terms and at law does not convey any fee from the wife.”¹

§ 200. In Alabama.—In Alabama, also, it is held that where several persons are mentioned in a deed as grantors, another person who is not named in the instrument is not one of the grantors, although he may sign and seal it, and the deed does not pass his interest in the lands described in the conveyance.² In the case just cited, Manning, J., said: “The persons named in the deed as grantors, by signing and sealing it, declare and make known to all whom it may concern, that they respectively grant, bargain, enfeoff, and convey the land therein described, to Thomas J. Harrison, and that they covenant with him that they are seised in fee, and have a right to sell and convey the land, and that they will warrant and defend the title. But what is declared or certified by the signature and seal of A. L. Barnett? Can they import anything else than is contained in the deed, to wit, that the persons described in it as grantors convey and covenant

¹ In *Purcell v. Goshorn*, *supra*.

² *Harrison v. Simons*, 55 Ala. 510. See as to rule in West Virginia, *Adams v. Medsker*, 25 W. Va. 127.

as above? It is not set forth in the deed that A. L. Barnett himself does, or shall do, any of these things; and we cannot see any efficacy or meaning to his mere signature and seal, apart or different from what is expressed in the instrument to which they are affixed."

§ 201. In Indiana, the same doctrine seems to prevail, and a deed does not bind a party who signs and seals it, unless he is also named as a party to it, and it contains apt words to convey his interest.¹ But in that State it is established that a surety who signs a bond is bound by its terms though his name does not appear in the body of the bond, and that in such a case, where their names are signed, with the name of the principal obligor, immediately after the words, "signed, sealed, and delivered in presence of us," the presumption is that they signed as makers and not as witnesses.²

¹ *Cox v. Wells*, 7 Blackf. 410; 43 Am. Dec. 98; *Davis v. Bartholomew*, 3 Ind. 485.

² *Scheid v. Leibshultz*, 51 Ind. 38. Referring to the point that the persons not named in the bond were not bound, the court said: "In support of this position, reference is made to *Cox v. Wells*, 7 Blackf. 410; 43 Am. Dec. 98. There it was said: 'The deed offered in evidence by the plaintiff, and shown in *oyer*, does not convey the interest of Conwell's wife in the premises, her name not being inserted in the body of the deed.' The ruling in the above case was followed in *Davis v. Bartholomew*, 3 Ind. 485, where it was held that to bar dower the deed itself must contain the words necessary to constitute a conveyance or release of dower, and it cannot be aided by the certificate of acknowledgment.

"The decision in *Cox v. Wells*, *supra*, was based upon two cases in Massachusetts—*Catlin v. Ware*, 9 Mass. 209; 6 Am. Dec. 56; *Lufkin v. Curtis*, 13 Mass. 223. In the case first cited, it was held that 'a deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case, whatever may be conceived of the intention of the demandant in signing and sealing the deed, there are no words implying her intention to release her claim of dower in the lands conveyed, which must have been to give it that operation. It was merely the deed of the husband, and the wife is not by it barred of her right to dower.' In the second cited, it was held that to release the dower to the wife, the deed should have contained 'words importing a release of her claim of dower.'

"The ruling in the preceding cases proceeded upon the theory that to convey or release the dower of the wife, the deed must contain words expressing a clear intention on his part to convey or release her dower,

§ 201 a. In Texas.—In a late decision in Texas the same principle is announced, and the court say: "It has been said that the signing of a deed manifests the intention of the signers to be bound by it, and that the court should construe every instrument so as to give effect to the intention of the parties to it. But the intention of the parties to a written contract must be derived from the language of the contract itself; and when there is nothing in the deed to show an understanding on part of one of the signers to convey, we do not see very clearly that his signature manifests a purpose to make a conveyance. When the title is in one person and the consent of another is essential under the law to convey such title, and such

and that hence her name must appear in the body of the deed, as otherwise, there would be no means of ascertaining her intention. We think the above authorities can have no application to the present case, for all that is required to render the appellants liable as sureties is, that it should clearly appear that they intended to be bound by the terms of the bond, and this is plain from the act of executing it: *Dobson v. Keys*, Cro. Jac. 261; *Smith v. Crooker*, 5 Mass. 538; *Ex parte Fulton*, 7 Cowen, 484. An obligation which, by its terms, purports to be that of one person, as 'I hereby bind myself,' etc., and is executed by more than one, may be treated as the several obligation of each person who signs it, or the joint obligation of all: *Knisely v. Shenberger*, 7 Watts, 193; *Leith v. Bush*, 61 Pa. St. 395; *Parks v. Brinkerhoff*, 2 Hill, 663; *Smith v. Crooker*, 5 Mass. 538; *Wright v. Harris*, 31 Iowa, 272.

"The question involved has been expressly decided by this court in two cases. In *Potter v. The State ex rel. Thompson*, 23 Ind. 550, the name of the surety was not in the body of the bond, but it was held that this did not render it void as to him, as his signature to the bond was sufficient; and *Pequawkett Bridge v. Mathes*, 7 N. H. 230; 26 Am. Dec. 737, and *Smith v. Crooker*, 5 Mass. 538, are cited.

"In the *Wild Cat Ranch v. Ball*, 45 Ind. 213, the question is fully considered. Many authorities are cited and reviewed. The conclusion reached was, that the liability of the sureties was fixed by their execution of the bond, and it was for this held that the fact that the name of the principal appeared in the body of the bond created no liability against him without he subscribed the bond. In *Knisely v. Shenberger*, *supra*, the court said: 'If there was a time when courts listened to trivial and verbal inaccuracies in contracts, when the real meaning and intention of the parties was plain, that time has gone by, and the only object of courts is, that where the meaning and intention of the parties are perfectly plain, no grammatical inaccuracy or want of the most appropriate words shall render the instrument unavailing.' We think the language used quite appropriate to the present case."

other signs the deed, his name not appearing therein as a grantor, the signature, it would seem, would merely manifest his consent to the conveyance.”¹

§ 202. **In Mississippi.**—In Mississippi it is considered that all that is necessary to bind a party is, that the conveyance should be signed in such a manner as to show his intention of making it his act and deed. “Anciently, sealing and delivery were necessary to a deed, but it was not essential that it should be signed, nor was the sealing required to be on any particular part of it.”² Afterward the practice of signing grew up under the requirements of the statute of 29 Charles II, chapter 3, and the registration acts. But these statutes did not prescribe the manner of signing, and all that seems to have been required by their policy was that the instrument should be signed by the party in such a manner as to show that he intended it as his act and deed. The most essential and efficacious act to give it validity was the delivery, because that more clearly showed that he intended it as his deed; and, accordingly, it is said that if one signs and seals a deed, and another delivers it as his act and deed, the latter thereby adopts and makes it his deed.”³ The court considered the subsequent acknowledgment of the instrument as a fact of importance, and said: “But the acknowledgment of the deed by the husband removes all doubt upon this point. It explains the act, which, without it, might have been doubtful, by a contemporaneous declaration that he intended to sign, seal, and deliver it as his act and deed, and this affords the best exposition of its character.”⁴ In a subsequent case the court said

¹ *Stone v. Sledge*, 87 Tex. 49; 47 Am. St. Rep. 65. It was held, however, in *Ochoa v. Miller*, 59 Tex. 460, that when a husband not named as a party to a deed purporting to convey his wife's separate property, signed and acknowledged the deed, it was sufficient to show his assent to it, and, as he had nothing to convey, that was all that was essential on his part to pass title to the property.

² Citing 2 Co. Litt. 234, notes; 2 Blackst. Com. 305.

³ *Armstrong v. Stovall*, 26 Miss. 275.

⁴ *Armstrong v. Stovall*, *supra*. In that case, immediately after the
DEEDS, VOL. I. — 15

that if a husband signed the deed of his wife, in which he was not named as a party, that "his signing, delivery, and acknowledgment of the deed would estop him from setting up any claim to the property against the grantee, and show that the title of the wife was conveyed by his co-operation."¹

§ 203. **In California.**—Under a statute which provided that the separate property of the wife could be conveyed only "by an instrument in writing signed by the husband and wife," a deed was held sufficient which mentioned her as the conveying party, which she signed, and at the close of which the husband, though not named in the body of the deed, signed the statement: "I have read the foregoing, and fully agree with the conveyance made by my wife."²

§ 204. **Comments.**—The question whether a person who signs a deed, but is not named in it as grantor, is bound by it, should, in the author's judgment, be one of construction, to be determined by reference to the circumstances connected with the transaction, rather than by a fixed and arbitrary rule of law. In several of the cases that have been cited in the preceding sections, the de-

wife's signature to the deed, the husband signed the following: I, Edmond Jenkins, husband of the said Mary Jenkins, do hereby consent to the above obligation of my wife. Witness my hand and seal, this 10th day of February, 1846. Edmond Jenkins. [Seal.]

¹ *Stone v. Montgomery*, 35 Miss. 83, 107. In *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65, it is said that the cases cited above from Mississippi are distinguishable from a case where a person signs a deed purporting to be wholly the act of another, and where it is asserted that the property of the signer passes by the deed.

² *Ingoldsby v. Juan*, 12 Cal. 564. In *Dentzel v. Waldie*, 30 Cal. 138, the signature by the husband at the end of the deed was considered sufficient to make it his deed under a statute providing that "a husband and wife may by their joint deed convey the real estate of the wife," etc.: See *Green v. Swift*, 49 Cal. 260. Where two persons are described in a deed, and one of them does not sign and seal the deed, the covenants in favor of the parties of the first part, it is held, will inure to the benefit of the one who did sign: *Philadelphia etc. R. R. Co. v. Howard*, 13 How. 307, 338.

cision of the court was based upon the ground that a wife could not relinquish her right of dower, unless the conveyance contained apt words expressive of such an intent, and that by merely signing a deed in which she was not mentioned, her claim of dower remained unaffected. Possibly, a distinction can be drawn between such cases and cases where the party signing was under no disability. The general rule for construing all contracts is that if it appears by a contract that a party intends to bind himself, trivial inaccuracies will be disregarded, and, if the intention of the parties can be ascertained, courts will effectuate that intention. Now, if a party signs a deed, he must do it for some purpose. It is in practice the general custom for deeds to be drawn by others than the parties to them. The scrivener may have omitted the name of the grantor, or by mistake may have inserted a wrong name. If such should be the case, and a party should sign a deed, intending to bind himself, all parties supposing he had executed an effectual conveyance, is it reasonable to say that the deed is nugatory because the party signing was not named in the conveyance? The fact that he signs and delivers the deed should be entitled to greater consideration in determining whether he intended to convey his title, than the writing of his name in the deed by some one else. It has been objected to this view, that the relations between the parties are to be determined from the language of the deed, and if that shows an intended contract between a party who does not execute the instrument, the party who does sign cannot be bound, because he is, so far as the deed itself evinces the intention of the parties, a person with whom no contract was intended to be made. But assuming that such an instrument shows that the contract was originally intended to be made between certain persons, and that is all that can be claimed, such an intention may subsequently have been altered. If the name of the party originally mentioned in the deed should be erased, and the name of the party signing substituted, there can be

little question that the party whose name was substituted, and who executed the instrument, would be firmly bound by the instrument. If he signs the instrument, though his name is not substituted or mentioned at all in the deed, should not some effect be given to his act? We think so. While it may well be that in such a case he should not be conclusively bound, yet we think that by his signature and delivery of the deed, he should be held presumptively to have assented to its provisions; or, at all events, that his intention should be considered so uncertain and ambiguous that the court should, by reference to all the circumstances not tending to contradict the deed, but to explain the conditions surrounding its execution, attempt to ascertain his meaning.

§ 205. **Christian name.**—The law recognizes but one Christian name, and, therefore, an error in the middle name, or its initial, or its entire omission, cannot affect the validity of a deed.¹ Where a plaintiff brought suit under the name of William Robinson, and for the purpose of showing title, produced a deed to William T. Robinson, the variance was considered immaterial. The letter “T” was regarded as no portion of his name. The plaintiff, if he thought proper, was entitled to prove that he was as well known without, as with, the letter “T” in the middle of his name.² A grantor, being ignorant of the first name of the grantee, left a blank for its insertion, intending to fill the blank before delivering the deed. But, in delivering the deed, he omitted, through neglect, to insert the grantee’s Christian name. Subsequently the grantee, for the purpose of defrauding his creditors,

¹ *McDonald v. Morgan*, 27 Tex. 503.

² *Franklin v. Talmadge*, 5 Johns. 84. See *Dunn v. Games*, 1 McLean, 321; *Erskine v. Davis*, 25 Ill. 251; *Jackson v. Stanley*, 10 Johns. 133; *Games v. Stiles*, 14 Peters, 322; *Jackson v. Hart*, 12 Johns. 77; 7 Am. Dec. 280; *Jackson v. Miner*, 15 Johns. 226; *Jackson v. Cody*, 9 Cowen, 140; *Roosevelt v. Gardiner*, 2 Cowen, 463; *Nicodemus v. Young*, 90 Iowa, 423; *Banks v. Lee*, 73 Ga. 25; *Schofield v. Jennings*, 68 Ind. 232; *Gillespie v. Rogers*, 146 Mass. 610.

inserted the Christian name of his wife, without her knowledge. It was held that, though the deed might be ambiguous, yet the ambiguity could be removed by proof *aliunde*, and that the title vested in the husband was not divested by filling the blank with the Christian name of the wife.¹

§ 206. **Mistake in Christian name.**—A mistake in the Christian name will be disregarded if it can be gathered from the whole instrument who is the party intended.² But it is said that the presumption of law is that the parties use their real names, and not that they have different names. On this ground, in Michigan, a record of a deed purporting to be signed by Harmon Sherman, and to be acknowledged by Hiram Sherman, was held inadmissible to prove a conveyance by Hiram Sherman.³ A party

¹ *Fletcher v. Mansur*, 5 Ind. 267. "The deed was delivered by the grantor to Barratt," says the court, per Davison, J., "with the intention of vesting in him the legal title, and no doubt that was its effect. Though the deed wanted his Christian name, and on that account might be considered ambiguous, still that was an ambiguity that could have been supplied by proof *aliunde*. The title thus being in Barratt as grantee, could not be divested by the mere insertion of the Christian name of his wife in the blank left by the grantor. That insertion in our opinion was a void act, and conveyed to her no title." But if the first name is not given, but only the initial, the middle name or initial may become material: *State v. Higgins*, 60 Minn. 1; 51 Am. St. Rep. 490. And in some cases the middle name or initial has been considered a material part of the name: *Ambs v. Chicago, St. P. etc. Ry. Co.*, 44 Minn. 266.

² *Merchants' Bank v. Spicer*, 6 Wend. 443; *Middleton v. Findla*, 25 Cal. 81; *Nixon v. Cobleigh*, 52 Ill. 387.

³ *Boothroyd v. Engles*, 23 Mich. 19. The court said: "Our statutes now require every deed to be signed and sealed by the person from whom the estate or interest is intended to pass, as well as acknowledged by the person executing it. The signing cannot be dispensed with, and no one but the signer can be regarded as the grantor. The presumption of law always must be that a person uses his real name, and there is no presumption that he is known by different names. And in the absence of proof, a deed signed by Harmon and acknowledged by Hiram, is signed and acknowledged by different persons. There is nothing in the certificate of acknowledgment which can supply the defect if it could be supplied in that way, upon which there is no occasion to express an opinion. Hiram Sherman in legal presumption has executed no deed which he could acknowledge. A person may be known by an *alias* as well as by

who executes a deed in one name, is estopped from asserting that the name by which he signed the conveyance is not his true name; proof of its execution will be sufficient.¹ Thus, if a person is designated as James in the body of the deed, and executes it in the name of John by adopting the latter name in the signature, and is sued in the name of John and pleads the misnomer, the plaintiff may rely on the estoppel. The deed will be considered conclusive evidence of the adoption by the party of the names both of James and John.² Where there is a variance between the names of the grantors as they are written in the body of the deed and in the signatures, and the deed has been properly acknowledged, the identity of the persons will be presumed until rebutted.³

§ 207. The designation "junior."—The designation of "junior" or "second" is no part of a person's name, and though its use may be convenient to distinguish a particular person from another bearing the same name, the person intended may be shown by any other means as well.⁴

his real name, and perhaps may use a name for a single occasion which he would be *estopped* to deny. But this could only be shown by directly connecting him by proof with the execution and delivery of the deed, and in such a case he would not be bound because he had acquired a new name in fact, but only because he had so acted that in the given case he could not be heard to dispute his own act. If there had been proof in this case that Hiram Sherman was known also by the name of Harmon Sherman, we are not prepared to say it would not have laid a foundation for introducing the record. But it is not competent to introduce it until some such foundation has been laid to connect the two variant names."

¹ Com. Dig. Fait. Bl.; *Boothroyd v. Engles*, 23 Mich. 19, *supra*; *O'Meara v. North American etc. Co.*, 2 Nev. 112; *Nixon v. Cobleigh*, 52 Ill. 387.

² *Gould v. Barnes*, 3 Taunt. 505; *Lind v. Hook*, Mod. Cas. cited Cro. Eliz. 807 n. a.; *James v. Whitbread*, 11 Com. B. 406; *Reeves v. Slater*, 7 Barn. & C. 489; *Williams v. Bryant*, 5 Mees. & W. 454. See *Elliott v. Davis*, 2 Bos. & P. 339.

³ *Lyon v. Cain*, 36 Ill. 362.

⁴ *Cobb v. Lucas*, 15 Pick. 7; *Kincaid v. Howe*, 10 Mass. 203; *Commonwealth v. Perkins*, 1 Pick. 388. See *Sawyer v. Northan*, 112 N. C. 261. The word "administrator" after the name of a person is "descriptive

§ 208. **Deeds to partners.**—When a deed is made to a partnership, it should mention the names of the partners individually, as those not mentioned cannot take as grantees.¹ But where a deed is executed to four persons by name, and they are described as composing a partnership, it conveys the legal title to an undivided one-fourth of the property to each of the four grantees. This interest, however, is encumbered by an equitable lien in favor of the other partners.² Where a deed is made to a partnership, one partner in that name has power to convey the legal as well as the equitable title, if he had power to do so at the time the deed was executed. Subsequent parol consent will also ratify his act.³

§ 209. **Ascertaining intended grantee.**—A deed made to A & Co. transfers the legal title to the land to A alone, and a deed executed by him will convey to his grantee a good and valid title.⁴ As an illustration of the rule that though a deed be made to a party under a wrong baptismal name, it is valid and the title vests in the intended grantee, we may select the case of *Staak v. Sigelow*.⁵ In

personæ" merely: *Jackson v. Roberts*, 85 Ky. 410. A person, A, intending to act as the agent for his minor son, A Jr., purchased land of B, who believed A was purchasing, and accordingly executed the deed to him in his own name. A added "Jr." to his name written in the deed, and had it recorded. He at the same time gave a mortgage to B, the grantor, to secure the purchase money, and signed it in his own name. It was held against those claiming under the son that the deed did not divest the title of B: *Sawyer v. Northan*, 112 N. C. 261.

¹ *Beaman v. Whitney*, 20 Me. 413. But the partners whose names appear in the firm will hold for themselves and for those associated with them.

² *McCauley v. Fulton*, 44 Cal. 355. See *Arthur v. Weston*, 22 Mo. 378. A deed to a partnership without mentioning the individual partners is not void, but may be explained by parol: *Murray v. Blackledge*, 71 N. C. 492.

³ *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761. His power to act may be presumed from lapse of time: *Frost v. Wolf*, *supra*; *Lindsay v. Jaffray*, 55 Tex. 626; *Percifull v. Platt*, 36 Ark. 456; *Moreau v. Saffarans*, 3 Sneed, 595; 67 Am. Dec. 582; *Arthur v. Weston*, 22 Mo. 378; *Chavener v. Wood*, 2 Or. 182.

⁴ *Winter v. Stock*, 29 Cal. 407; 89 Am. Dec. 57, and cases cited.

⁵ 12 Wis. 234.

that case a deed was made to Louis Staak, but as no person of that name was known to exist, and as the circumstances indicated that Arnold Staak was the intended grantee, title was held to be in him, and the ambiguity was allowed to be explained by parol evidence.¹ A deed was made by L, senior, to the heirs of L, junior, in consideration of the natural love and affection for his grandchildren. At the time of the execution and delivery of the deed, L, junior, was living, and as in legal contemplation he could have no heirs, it was contended that the deed was void for uncertainty. But the court took the view that by the use of the word "grandchildren," it was apparent that the grantor employed the word "heirs" in its popular sense, and hence sustained the validity of the deed.² Where the description in the deed is so uncertain that it applies to two or more persons, it is incumbent upon the one claiming that he is the one intended to show that fact.³

§ 210. Further description of the parties.—When a woman is a party to a conveyance, it is desirable in case she is married to give her husband's name, and if unmarried to describe her as a "single woman" or a "widow." It is customary to state the place of residence of the parties, and frequently a designation of the occupation of each is added. These matters are of service in identifying the parties whenever a doubt arises as to the persons intended. Where the parties act in a trust relation as trustees, guardians, or executors, it should clearly appear that the conveyance is made by or to them as such. For unless apt words are used to transfer the title from the real party in interest, the deed, though it be signed by the trustee or executor, and designates him as such, will

¹ *Staak v. Sigelow*, 12 Wis. 234, *supra*.

² *Huss v. Stephens*, 51 Pa. St. 282.

³ *Grand Gulf R. R. Co. v. Bryan*, 16 Miss. (8 Smedes & M.) 234. If the deed does not name the grantee, he must be described in such a manner as to enable him to be identified: *Simmons v. Spratt*, 20 Fla. 495.

be held to be his own personal deed.¹ Where an heir undertook to convey inherited land, and described himself as agent for the heirs of the decedent in one part of the deed, but in the other portions designated himself as grantor, and executed the deed in his own name, the conveyance was admitted in evidence as his own deed.² But where there is a sufficient identification of the party, an incorrect description will be rejected as surplusage.³

PART IV.

THE GRANTING WORDS.

§ 211. **An intention to convey should be shown.**—To enable a deed to operate as an effectual conveyance there should be proper and sufficient words manifesting an intention to transfer an estate. Where the words “sign over” were the only expression from which an intent to convey might be assumed, it was held that the instrument could not operate as a grant.⁴ But its validity is not affected by the use of the wrong tense. No difference is caused by the employment of the words “has given and granted,” instead of “do” or “does give and grant”; either expression will suffice.⁵ A grant was made to A and his heirs, and contained a proviso that if A died in his minority without issue, then the estate was “to go” to the issue of B. It was held that the words used, though not technical terms of conveyance, were sufficient to convey the estate to such issue as a remainder.⁶ The word

¹ *Bobb v. Barnum*, 59 Mo. 394.

² *Endsley v. Strock*, 50 Mo. 508.

³ *Jackson v. Root*, 18 Johns. 59; *Jackson v. Clark*, 7 Johns. 217. A grantor described herself as “formerly widow and sole heir of Jason C. Bartholomew, deceased,” but it was held that such recital did not prove or tend to prove the fact that she was such widow or heir: *Soukup v. Union Investment Co.*, 84 Iowa, 448; 35 Am. St. Rep. 317.

⁴ *McKenney v. Settles*, 31 Mo. 541. See *Bentley's Heirs v. De Forrest*, 2 Ohio, 221; 15 Am. Dec. 546. See *Ingell v. Nooney*, 2 Pick. 362; 13 Am. Dec. 434.

⁵ *Pierson v. Armstrong*, 1 Iowa, 292; 63 Am. Dec. 440. See *Wiseley v. Findlay*, 3 Rand. 361; 15 Am. Dec. 712.

⁶ *Folk v. Varn*, 9 Rich. Eq. 303, 310.

"grant" has become a generic term of transfer.¹ But no particular formula of words is necessary to effect a valid conveyance of land. If the words used show an intent to convey, they are sufficient for that purpose.²

§ 212. *Nature of the deed.*—It was at one time considered important that the words of the grant should conform to the nature of the deed. For a feoffment the proper words were said to be "give," "grant," "enfeoff," etc; and for a deed of bargain and sale, "grant, bargain, and sell."³ But these words are now unnecessary if there be other words of a like import showing the intention to convey. By the words "I have given and granted," a grant, a feoffment, a gift, lease, or release, a confirmation or surrender may be created, and the grantee has the privilege of determining for which of these purposes he will use the conveyance.⁴ The operative words usually

¹ *S. F. & O. R. R. Co. v. Oakland*, 43 Cal. 502.

² *Gambril v. Rose*, 8 Blackf. 140; 44 Am. Dec. 760; *Cobb v. Hines*, Busb. 343; 59 Am. Dec. 559. See *McWilliams v. Martin*, 12 Serg. & R. 269; 14 Am. Dec. 688. A deed was held sufficient to convey land and not to create a copartnership, stating that the grantor, for love and affection for the grantee, "do give and release unto him so much at, along, below, and above the milldam upon my land, known by the name of the Mill's Old Dam, and adjoining his, as will serve for the purpose of cutting a race, and for wasteway and mill, all conveniences in putting up same and lumber yards, also free ingress and egress to and from said mill or pond through my lands, and also of backing water upon my land to the height of thirteen feet live water, and all the privileges of said mill two-thirds of the time (reserving to myself one-third part of said mill, after paying one-third part of whatever amount it may cost him [the grantee] in putting in operation said mill), the same being situated on Dean swamp, . . . the right to which I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend unto the said John Jordan [the grantee], his heirs and assigns forever, reserving to myself the same privileges given and relinquished to him": *Jordan v. Neece*, 36 S. C. 295; 31 Am. St. Rep. 869. Precise technical words, however, are unnecessary, any language equivalent to a present contract of bargain and sale being sufficient. If the courts can discover an intention to pass the title they will give effect to the deed, although the expression may be inaccurate: *Harlowe v. Hudgins*, 84 Tex. 107; 31 Am. St. Rep. 21.

³ 1 Wood on Conveyancing, 203; 3 Wash. Real Prop. (4th ed.) 379.

⁴ *Rowe v. Beckett*, 30 Ind. 154; 95 Am. Dec. 676. And see *Folk v.*

employed in a deed of lease and release, as we have seen, are "grant, bargain, and sell," which give effect to the lease; and the words "grant, bargain, sell, remise, release, and forever quitclaim," render the release effectual. A deed is to be so construed as if possible to give effect to it as a conveyance; hence it will be allowed to have this effect, although it may lack formal words, if it contains sufficient words to convey the estate.¹ From the employment of particular granting words, certain implied covenants were implied, which will be treated of in another part of this treatise.

PART V.

THE HABENDUM.

§ 213. The habendum is not an essential part of a deed.—The purpose of the *habendum* is to define the estate which the grantee is to take in the property conveyed, whether a fee, life estate, or other interest.² It has now, as Chancellor Kent observes, degenerated into a mere useless form, and in some of the states it has been altogether dispensed with.³ "The *habendum* is no essential part of the deed. It merely denotes the extent of the estate granted; in modern conveyancing it is almost practically obsolete, and may be entirely rejected if repugnant to the other clauses of the conveyance."⁴

Varn, 9 Rich. Eq. 303; Patterson v. Carneal, 3 A. K. Marsh. 619; 13 Am. Dec. 208.

¹ Jennings v. Brizeadine, 44 Mo. 332; Wilcoxson v. Sprague, 51 Cal. 640; Lynch v. Livingston, 8 Barb. 483, 485; Marden v. Chase, 32 Me. 329; Collins v. Lavelle, 44 Vt. 230; Pierson v. Armstrong, 1 Iowa, 282; 63 Am. Dec. 440; Jackson v. Alexander, 3 Johns. 484; 3 Am. Dec. 517; Shove v. Pencke, 5 Term Rep. 124; Roe v. Tranmarr, 2 Wils. 75, 78; Clanrickard v. Sidney, Hob. 277; Young v. Ringo, 1 Mon. 30, 32; 1 Wood on Conveyancing, 203; 2 Rolle. Abr. 789, pl. 30; Shep. Touch. 82, 222; Cornish on Purchase Deeds, 29; 3 Wash. Real Prop. 379. The Spanish word "cedo" was the word ordinarily used in Mexican conveyances: Schmitt v. Giovanari, 43 Cal. 617.

² Mitchell v. Wilson, 3 Cranch C. C. 242; Wager v. Wager, 1 Serg. & R. 374.

³ Major, Admr., v. Bukley, 51 Mo. 227.

⁴ Major, Admr., v. Bukley, *supra*.

§ 214. **Repugnance between granting words and habendum.**—Where proper words of limitation are employed in the granting clause, there is no benefit to be obtained by the *habendum*. Where there is a repugnance between the words expressing the grant and the *habendum* concerning the estate the grantee is to take, the rule governing the construction of all contracts will be applied, and effect will be given to both clauses if possible. Yet where there is a definite limitation in the words of the grant, and there is a conflict between them and the *habendum*, the latter must yield.¹ If it appears from the whole instrument that it was intended by the *habendum* clause to restrict or enlarge the estate conveyed by the words of grant, the *habendum* clause will prevail.²

§ 215. **Qualification of previous grant.**—In California, where it is not necessary to use the word “heirs” to convey a fee simple, a deed was made containing no words of inheritance, but simply granted, bargained, conveyed, and confirmed to the grantees a tract of land. The *habendum* was: “To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said parties of the second part, and to the longest liver of them, for and during their natural lives and the natural life of such longest liver, remainder thereafter to the issue and heirs of their two bodies, begotten and to be begotten, and the heirs of such issue forever, to and for the use and benefit of such longest liver of them, for and during the life of such longest liver, and thereafter to and for the use and benefit of the said issue and heirs of their two bodies, begotten and to be begotten, in equal shares, as tenants

¹ Farquharson v. Eichelberger, 15 Md. 63; Major v. Buckley, 51 Mo. 227; Budd v. Brooke, 3 Gill, 236; 43 Am. Dec. 321; Flagg v. Eames, 40 Vt. 23; 94 Am. Dec. 363; Rimes v. Mansfield, 96 Mo. 394; Henderson v. Mack, 82 Ky. 379; Ratliffe v. Marrs, 87 Ky. 26; Berry v. Billings, 44 Me. 416; 69 Am. Dec. 107; Brown v. Manter, 21 N. H. 528; 53 Am. Dec. 223. See Warn v. Brown, 102 Pa. St. 347.

² Barnett v. Barnett, 104 Cal. 298.

in common, the issue, if any, of any child of their bodies, who may die before the death of the longest liver of the said parties of the second part, to take the share and portion of such deceased child." It was decided, that the limitation in the *habendum* clause was not repugnant to the granting clause, and that the conveyance vested a life estate in the grantees and a full estate in their children.¹ Where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the *habendum* performs the office of defining, qualifying, or controlling it.² For example, where a lease of land

¹ *Montgomery v. Sturdivant*, 41 Cal. 290. Temple, J., delivering the opinion of the court, said: "If the *habendum* were entirely omitted, the deed in question would undoubtedly have conveyed an estate in fee simple, and it is, therefore, contended that the language of the *habendum*, which attempts to limit the estate granted to a life estate, is repugnant. Independently of the statute, the common-law rule was that a deed like this, without the *habendum*, would convey a life estate only. The estate, though different, was just as definite as that under the rule of the statute. If the argument of counsel were correct, the result would have been that the grant could not have been enlarged by the *habendum*. Yet we all know that where the formal parts of a deed are all used, this was the customary mode of conveying, and is still often followed.

"The rule of common law was only intended to apply to conveyances in which the extent of the ownership of the grantee in the thing granted was not defined in the conveyance. The statute rule was merely intended to take the place of the common-law rule. Neither was intended to override the expressed intention of the parties. The office of the *habendum* is to limit and define the estate which the grantee is to have in the property granted. It is not an essential part of a deed, but has generally been used, and in some states the form adopted in this case is in general use. No estate is limited in the granting part of the deed, but this is done in the *habendum*. The legislature did not intend to prohibit this form of conveyance, but merely to supply a rule of construction when the parties failed to define the estate conveyed. The word "grant," in the last part of the section of the statute, has precisely the same meaning as the word "conveyance" in the preceding clause. Giving full effect to the language of the *habendum* clause in this deed, it is a conveyance to the grantees for their joint lives, and to the survivor during the life of the survivor, with remainder to the issue and heirs of their two bodies, and the heirs of such issue forever."

² Co. Litt. 6 a; *Sumner v. Williams*, 8 Mass. 162, 174; *Berry v. Billings*, 44 Me. 423; 69 Am. Dec. 107; 1 Wood on Conveyancing, 224.

was made to a person, *habendum* to him and his heirs, it was held to convey a fee.¹

§ 215 a. **When habendum controls.**—It may be formulated as a rule that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the *habendum* to control, the granting words will govern. But if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the *habendum*, the latter must control.² In a deed from a husband to his wife, after the *habendum* clause was a condition that she should not convey or mortgage the premises without his written assent, and that in the event of her death occurring before his, the property conveyed should revert to him or his assigns. The court construed the deed as showing an apparent intention that the grantee's interest should cease if she died before the grantor, but that if she survived him the absolute title should become vested in her.³

§ 216. **It is not the province of the habendum to introduce new subject matter into the grant.**—Where more property is included in the *habendum* than is mentioned in the grant, the portion not comprised in the grant will not pass by virtue of the *habendum*.⁴ It has been stated that "where a deed first speaks in general words, and afterward in special words, and the latter accord with the former, this deed shall operate according to the spe-

¹ *Jamaica Pond v. Chandler*, 9 Allen, 168.

² *Bodine's Admr. v. Arthur*, 91 Ky. 53; 34 Am. St. Rep. 162. In that case the *habendum* was: "To have and to hold unto the said Hettie E. Bodine, wife of the said B. W. Bodine, and to her children by him begotten forever." The court held that the deed conveyed a life estate to the grantee, with remainder to her children.

³ *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404.

⁴ *Manning v. Smith*, 6 Conn. 289. But this principle does not apply to such incidents as would pass by the grant, though they are enumerated only in the *habendum*: *Sumner v. Williams*, 8 Mass. 162. See *Den v. Helmes*, 3 N. J. L. 1050; *Swazey v. Brooks*, 34 Vt. 451.

cial words, whether they enlarge or restrain the general words that precede.”¹

§ 217. **Reference to habendum.**—When the premises contain an express reference to the *habendum*, the latter may limit and qualify the terms of the grant, and prescribe the mode in which the estate is to be enjoyed. Thus, where one by deed granted land to another, “his heirs and assigns forever, subject to the limitations hereinafter expressed as to part thereof,” and in the *habendum* limited the estate as to one-half to the grantee’s use during his natural life, and at his decease to descend to his children by him lawfully begotten, and to the issue of such as were then deceased, it was held that the grantee took by the conveyance a fee simple as to one-half of the land, and a life estate in the other.²

§ 218. **Explanatory clause.**—In Nevada, a deed, after granting a certain number of feet of the interest of the grantor in a mining claim, contained this explanatory clause: “The interest herein intended to be conveyed, to include also and carry along with it an interest of equal extent in all the ledges and lodes in which said party of the first part is owner, and which will be reached and prospected by said parties of the second part in their continuation of the tunnel of the ‘Gold Hill Tunneling Company,’ said continuation commencing at a point four hundred feet in from the mouth of the tunnel.” The court decided that this clause should not have the effect of conveying any interest which was not included within the natural signification of the granting words.³

¹ 1 Wood on Conveyances, 199, 212, 223, 224, n.; *Wrotesley v. Adams*, Plowd. 187, 196. See *Ford v. Flint*, 40 Vt. 382; *Moss v. Sheldon*, 3 Watts. & S. 162.

² *Tyler v. Moore*, 42 Pa. St. 374.

³ *McCurdy v. Alpha Mining Co.*, 3 Nev. 27. The court said, per Beatty, C. J: “This explanatory clause is entitled to all due weight, and under the liberal rules adopted by the more modern decisions in the interpretation and enforcement of deeds, it might, perhaps, even have the effect of passing title to that which by no possibility could be under-

§ 219. Under what circumstances a party not named as a grantee may take under the *habendum*.—Where there is no repugnance between the granting clause and the *habendum*, a party not named in the former may take under the deed if named in the latter.¹ Thus, there is no repugnance between the two clauses when the party who is to take is not named in the grant, but may be ascertained from the *habendum*.² A person who is not named in the premises as a grantee may take by way of remainder, but where the grant is to one person, the *habendum* cannot be operative when it is to him and another to take as joint tenants or tenants in common.³ In a case of that character the *habendum* would be at variance with the grant. Where the premises contain a complete grant, the *habendum* cannot have the effect of defeating or curtailling the estate granted.⁴

§ 220. Effect of the *habendum* to limit the estate.—While the *habendum* cannot abridge an estate granted, yet where the granting clause does not mention the estate conveyed, the *habendum* may have the effect of de-

stood as having been included within the granting clause of the deed. But before giving such effect to mere explanatory words, it should appear from the instrument beyond all reasonable doubt, that it was the intent of the parties using the words to give them such effect. Parties usually describe in the *granting* clause of a deed all that they intend to convey. And no court should hold that a party by his deed has conveyed more than is described or referred to in the granting clause, unless forced to that conclusion by language in other portions of the deed which clearly and beyond all reasonable doubt shows an intent on the part of the grantor to part with more property than was described in the granting clause. This explanatory clause, although not strictly the *habendum* of the deed, is somewhat similar to the *habendum*, and it appears to us should be construed in the same way."

¹ Tyler v. Moore, 42 Pa. St. 388; Irwin v. Longworth, 20 Ohio, 581.

² Spyve v. Tonham, 3 East, 115; 1 Wood on Conveyancing, 206, 212; 3 Wash. Real Prop. (4th ed.) 438. *Contra*, Bustard v. Coulter, Cro. Eliz. 902, 903; Berry v. Billings, 44 Me. 424; 69 Am. Dec. 107; Sumner v. Williams, 8 Mass. 174; 5 Am. Dec. 83.

³ Greenwood v. Tyler, Cro. Jac. 564; Brooks v. Brooks, Cro. Jac. 434. See Walters v. Breden, 70 Pa. St. 237.

⁴ Nightingale v. Hidden, 7 R. I. 118; Walters v. Breden, 70 Pa. St. 237; 4 Cruise, 272.

clarifying the intention, and may overcome any presumption that in its absence would properly arise from the defect in the preceding clause.¹ But it is to be understood that the *habendum*, when irreconcilable with the granting clause, is to be rejected,² and is to affect the grant only when it can be construed as consistent with the premises.³

PART VI.

THE REDDENDUM.

§ 221. **Reddendum, what is.**—The clause of *reddendum* generally follows the *habendum*, and is used when anything is to be reserved out of the property granted. There is a distinction between an exception and a reservation. By the former, the grantor withdraws from the operation of the conveyance which is in existence, and included under the terms of the grant. A reservation is “something arising out of the thing granted, not then *in esse*, or some new thing created or reserved, issuing or coming out of the thing granted, and not a part of the thing itself, nor of anything issuing out of another thing.”⁴ A reservation may be of some easement or servitude, existing and operative, and incapable of severance from the grant.⁵

§ 222. **What is necessary for a good reddendum.**—In every good *reddendum* or reservation there should be

¹ *Riggin v. Love*, 72 Ill. 553. A grant may be to one, the *habendum* to him and his heirs, or heirs of his body, or for the life of another: 3 Prest. Abst. Tit. 43. See *Carson v. McCaslin*, 60 Ind. 334; *Jackson v. Ireland*, 3 Wend. 99; *Corbin v. Healey*, 20 Pick. 514.

² *Riggin v. Love*, 72 Ill. 553; *Carson v. McCaslin*, 60 Ind. 337.

³ *Lee v. Tucker*, 55 Ga. 9.

⁴ 3 Wash. Real Prop. (4th ed.), 440; *Shep. Touch.* 80; *Craig v. Wells*, 11 N. Y. 315; *Marshall v. Trumbull*, 28 Conn. 183; 73 Am. Dec. 667; *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196; 30 Am. Rep. 672; *Moulton v. Trafton*, 64 Me. 218; *State v. Wilson*, 42 Me. 9; *Ives v. Van Auken*, 34 Barb. 566; *Bridger v. Pierson*, 1 Lans. 481; *Whitaker v. Brown*, 46 Pa. St. 197; *Munn v. Worrall*, 53 N. Y. 44; 13 Am. Rep. 470; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

⁵ *Cutler v. Tuft*, 3 Pick. 272, 278; *Doe v. Lock*, 4 Nev. & M. 807; *Pettee v. Hawes*, 13 Pick. 323, 326; *Hurd v. Curtis*, 7 Met. 110.

a concurrence of several things. One is that the reservation must be made to the grantor, or to one of the grantors in the deed, and not to a stranger.¹ Another is, that it must be out of the estate granted, and not out of something extraneous.² As in the case of a grant, the description of the thing reserved should be sufficiently definite as to enable it to be identified.³ Thus, where a deed reserves out of the property conveyed one acre of land, and there is nothing to show from what particular part of the tract it is to be taken, the reservation is void for uncertainty, and the grantee is entitled to the whole tract.⁴ It should also contain words of limitation to enable it to extend beyond the life of the grantor.⁵

PART VII.

THE TESTIMONIUM CLAUSE.

§ 223. **General use of the testimonium clause.**—It is customary to end a deed with a *testimonium* clause, such as “in witness whereof the parties have hereunto set their hands and seals,” etc. This clause was once of value as indicating an intention to execute a sealed instrument; and in those States where the use of seals has not been rendered unnecessary it may still have this effect. A common provision in several of the States is that “every instrument to which the maker affixes a scroll by way of seal shall be of the same force and obli-

¹ *Hornbeck v. Westbrook*, 9 Johns. 74; *Petition of Young*, 11 R. I. 636; *Bridger v. Pierson*, 1 Lans. 481; *Illinois R. R. Co. v. Indiana R. R. Co.*, 85 Ill. 211. But it seems that it may, if so intended, operate as an exception, and as notice to the grantee of adverse claims: *West Point Iron Co. v. Reymert*, 45 N. Y. 703. And see *Bridger v. Pierson*, 45 N. Y. 601; *Brossart v. Corlett*, 27 Iowa, 288.

² *Dyer v. Sanford*, 9 Met. 395; 43 Am. Dec. 399.

³ *Woodcock v. Estey*, 43 Vt. 515; *Jewett v. Ricker*, 68 Me. 377.

⁴ *Mooney v. Cooledge*, 30 Ark. 640.

⁵ *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 198; 30 Am. Rep. 672; *Dennis v. Wilson*, 107 Mass. 591; *Handy v. Foley*, 121 Mass. 259; 23 Am. Rep. 270; *Bean v. Coleman*, 44 N. H. 542; *Hornbeck v. Westbrook*, 9 Johns. 73. Words of limitation are unnecessary in the case of an exception: *Winthrop v. Fairbanks*, 41 Me. 307.

gation as if it were actually sealed, provided the maker shall, in the instrument, recognize such scroll as having been affixed by way of a seal." It has been decided, under statutes of this character, that, to give the scroll the effect of a seal, it must appear from the instrument that the scroll was so intended.¹ But where the word "seal" was placed opposite the signature, it was held to be sufficient under the Tennessee statute.² By the statute in Alabama, if an instrument purports in its body to be under seal, it will be treated as a deed, even though a seal or scroll is not annexed to the signature.³ In Indiana, however, an instrument was held to be only a simple contract, which concluded "witness our hands," and in which a scroll was annexed to the signature with the word "seal" written therein.⁴ It may be added that a scroll of ink or other device is not a seal, even though it is apparent that the intention was to use it as such, unless there is some statutory provision permitting it.⁵

§ 224. Relinquishment of the right of dower.—In those States in which the wife's right to dower is recognized, it is frequently the practice for her to relinquish her right by a clause expressing this intention. This is properly part of the *testimonium* clause.⁶ The following

¹ *Cromwell v. Tate*, 7 Leigh, 301; 30 Am. Dec. 506; *Armstrong v. Pearce*, 5 Har. (Del.) 351; *Lee v. Adkins*, Minor, 187; *Haseltine v. Donahue*, 42 Wis. 576; *Boynton v. Reynolds*, 3 Mo. 79; *Hudson v. Poindexter*, 42 Miss. 304; *Long v. Long*, 1 Morris, 43; *Norvell v. Walker*, 9 W. Va. 447; *Glasscock v. Glasscock*, 8 Mo. 577; *Grimsly v. Riley*, 5 Mo. 280; 32 Am. Dec. 319; *Walker v. Keile*, 8 Mo. 301; *Bell v. Keefe*, 13 La. An. 524.

² *Whitley v. Davis*, 1 Swan, 333. See *Wittington v. Clarke*, 16 Miss. (8 Smedes & M.) 480.

³ *Shelton v. Armor*, 13 Ala. 647. See *Starkweather v. Martin*, 28 Mich. 471; *Hudson v. Poindexter*, 42 Miss. 304.

⁴ *Deming v. Bullett*, 1 Blackf. 241. See *Jenkins v. Hart*, 2 Rand. 446. *Contra*, *Lewis v. Overby*, 28 Gratt. 627.

⁵ *Perrine v. Cheeseman*, 11 N. J. L. 174; 19 Am. Dec. 388; *Warren v. Lynch*, 5 Johns. 239.

⁶ *Davis v. Bartholomew*, 3 Ind. 485; *Fowler v. Shearer*, 7 Mass. 14; *Stinson v. Sumner*, 9 Mass. 143; 6 Am. Dec. 49; *Burge v. Smith*, 27 N. H. 332; *Learned v. Cutler*, 18 Pick. 9; *Stearns v. Swift*, 8 Pick. 532; *Witter v. Bescoe*, 13 Ark. 422.

form has been held sufficient for this purpose: "In witness whereof, I, the said Caleb Lassell, junior, and Susan, wife of said Caleb Lassell, in token that she relinquishes her right to dower in the premises, have hereunto set our hands and seals."¹ It would be foreign to the object of this treatise to discuss the nature of the rights so alienated. In some of the States, the release of the right of dower or of homestead is effected by a recital in the certificate of acknowledgment, and in cases where the question has arisen, it has been held in some States that it is unnecessary that the release should appear in the body of the deed.² In other States, however, it has been held that to make the release of either homestead³ or dower⁴ effectual, it should appear both in the body of the deed and in the certificate of acknowledgment.

¹ *Frost v. Deering*, 21 Me. 156.

² Concerning homestead, see *Babcock v. Hoey*, 11 Iowa, 375; *O'Brien v. Young*, 15 Iowa, 5; *Robbins v. Cookendorfer*, 10 Bush, 629. A release of dower is not necessarily a release of homestead: *Wing v. Hayden*, 10 Bush, 280.

³ *Witler v. Biscoe*, 13 Ark. 422; *Russell v. Rumsey*, 35 Ill. 362; *Connor v. McMurray*, 2 Allen, 202. And see *Hoge v. Hollister*, 2 Tenn. Ch. 606.

⁴ *Leavitt v. Lamprey*, 13 Pick. 383; 23 Am. Dec. 685; *Catlin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56; *Stevens v. Owen*, 25 Me. 94; *Powell v. Monson Co.*, 3 Mason, 349; *Hall v. Savage*, 4 Mason, 273. See *Lothrop v. Foster*, 51 Me. 367; *Westfall v. Lee*, 7 Iowa, 12.

CHAPTER VIII.

READING THE DEED.

- § 225. How far reading is essential.
- § 226. Duty of officer.
- § 227. Deaf and dumb person.
- § 228. Where person does not understand English.
- § 228 a. Considering deed not read a forgery.
- § 229. Burden of proof.
- § 230. Effect of erroneous reading.

§ 225. **How far reading is essential.**—The correct reading of an instrument is material to its execution by an illiterate person, as much so as the making of his mark.¹ “It is at the peril of the party to whom the deed is made that the true effect and purport of the writing be declared if required; but if the party who should deliver the deed doth not require it, he should be bound by the deed although it be penned against his meaning.”² Hence, proof of the grantor’s illiteracy and of his inability to read writing, and that a deed was not read to him, is not sufficient to avoid the deed, unless he requested that it be read to him.³ “There is no proof,” said Spencer, J., delivering the opinion of the court, “that the deed was read, and it is certain that the grantor was a very illiterate man; but the circumstance that the deed was not read is of no weight, unless it also appear to have been required, and of this there is no evidence; on the contrary, there can be no doubt but that the grantor was fully apprised of the nature and contents of the deed.”⁴

¹ *Suffern v. Butler*, 18 N. J. Eq. (3 Green, C. E.) 220.

² *Thoroughgood’s case*, 2 Co. 9, a, b.

³ *Hallenbeck v. De Witt*, 2 Johns. 404.

⁴ See *Withington v. Warren*, 10 Met. 434; *Souverby v. Arden*, 1 Johns. Ch. 252; *Taylor v. King*, 6 Munf. 358; 8 Am. Dec. 746; *Rex v. Longnor*, 1 Nev. & M. 576; *Rossetter v. Simmons*, 6 Serg. & R. 452.

§ 226. **Duty of officer.**—It is the duty of the officer authenticating the execution of a deed, in a case where the grantor is old, decrepit, and ignorant, to inform him of its contents by such means as will enable him to comprehend its nature and effect. This is not accomplished by a simple formal reading of the instrument.¹ In the case in which this principle was declared, it appeared that the scrivener read the deed in the presence of the parties. It was executed, however, without explanation or comment, except the scrivener thought he said to the grantor he supposed she understood she was giving the grantee a deed of her farm. She replied that she so understood it, and then said something about the grantee attending to her business, and she was satisfied he would do what was right.²

§ 227. **Deaf and dumb persons.**—Where there was no fraud on the part of the grantee, the deed of an uneducated deaf and dumb man, acknowledged before an officer and recorded, was upheld upon proof that the deed was explained to him, and he was believed to understand it.³

¹ *Lyons v. Van Riper*, 26 N. J. Eq. (11 Green, C. E.) 337.

² *Lyons v. Van Riper*, *supra*. The Vice Chancellor said, at page 343: "In dealing with persons in the helpless condition of this old woman, an officer having power to authenticate the execution of deeds, is bound to go further than a simple formal reading of the instrument. The contents are to be made known to the grantor by such means as will enable him to comprehend the nature and effect of his act. It is conspicuously manifest that this was not done in this case. I am satisfied the officer, by a grossly careless performance of his duty, unconsciously aided in the perpetration of a fraud, which he would have frustrated by the exercise of the care and vigilance the law requires him to employ in the discharge of his duties."

³ *Morrison v. Morrison*. 26 Gratt. 190. Anderson, J., in delivering the opinion of the court, stated the facts: "I do not think that the charge of fraud is supported by the proofs. It is true that the plaintiff was both deaf and dumb and was born so. But it appears from the testimony of both the plaintiff's and the defendant's witnesses that he was capable of making known his thoughts and wishes by signs to those who were well acquainted with him, and of understanding their communications to himself with a most remarkable certainty. He was not educated, but the weight of testimony shows that he was a man of intelligence, and was remarkably cautious in his business transactions, and understood well his own interests." The deed "was written more than

Where a person deaf and dumb and unable to read, directed a deed to be drawn and presented to him, and, his directions being carried out, he requested information only as to the land described, and an explanation was made to him commensurate with his request, and he then executed it without further explanation, it was held that the deed was valid, although no further information of the contents of the deed was given.¹

§ 228. Where a person does not understand English. To read an instrument in English to a person who is unable to understand the language, would seem to be insufficient.² But a party cannot object that he was misled in signing a deed, when he has the ability to read, or, if he is unable to read, fails to request to have it read.³ This rule is applicable to the execution of all contracts.⁴ In England, it has been held that a failure to read a deed to a party in the rough draft, before the execution, or when it is engrossed at the time of execution, is a badge of fraud.⁵

two years before he executed it, and remained in his possession, affording him opportunity of having it explained to him by his acquaintances, of which it is probable he availed himself. He sent for men to witness it who undoubtedly explained it to him. Mr. Miller, the justice before whom it was acknowledged, testifies that Skelton Coleman and G. J. Gray were witnesses to the deed, though their names do not appear to be subscribed to the copy in the record. And he says that both of them in his presence explained it to him before he executed it, and acknowledged it before him."

¹ *Brown v. Brown*, 3 Conn. 299; 8 Am. Dec. 187.

² *Fisher v. Meister*, 24 Mich. 447.

³ *School Committee of Prov. etc. v. Kesler*, 67 N. C. 443; *Jackson v. Croy*, 12 Johns. 427. A deed cannot be avoided on the ground of illiteracy when the grantor, although he cannot read and write, speaks the English language fairly well, is a person of ordinary understanding, and fully understood the contents and terms of the deed when it was read to him: *Bingham v. Salene*, 15 Or. 208; 3 Am. St. Rep. 152.

⁴ *Rogers v. Place*, 29 Ind. 577; *Clem v. Newcastle R. R. Co.*, 9 Ind. 488; 68 Am. Dec. 653; *Starr v. Bennett*, 5 Hill, 303; *New Albany R. R. Co. v. Fields*, 10 Ind. 187; *Russell v. Branham*, 8 Blackf. 277; *Metropolitan Loan Association v. Esche*, 75 Cal. 513; *Hawkins v. Hawkins*, 50 Cal. 558.

⁵ *Bennett v. Vade*, 2 Atk. 324, 327. Where a person supposed she

§ 228 a. **Considering deed not read a forgery.**—Where a person never intended to sign a deed, and never knew that he had executed one, but in fact had signed without reading, under the apprehension that it was an entirely different instrument, the deed thus signed may be considered a forgery. Thus, where one who signed a deed believed it to be a duplicate of a lease of a part of the property described in the deed, which, after a reading to and by him, he had signed, the lessee having placed two documents closely resembling each other together upon the table to be signed, and there being a previous understanding that two copies of the lease should be signed, the court held the instrument to be a forgery and not the deed of the signer, and, also, that in a suit to set aside the deed, it being a forgery, the question of signing a supposed copy of the lease without reading it could not be considered.¹ Where a title is founded upon a forged deed, it is not sufficient to examine the abstract simply, when the deed itself would have shown an alteration in its date, and when the grantor named in the forged deed was still in possession of the property.² But where a married woman acknowledges a deed before a notary under the mistaken belief that it was a lease which she had signed, but where she has full opportunity for determining its character, she is estopped by her acknowledgment from questioning the fact as against those claiming under the grantee without notice.³ If a person, knowing that he is doing some thing affecting his property, is assured that it is a mere form, and he has such confidence in his solicitor as to refrain from asking as to the precise effect of the deed, and executes it, accordingly, in igno-

was signing a mortgage to A, but which contained the name of B, and the agent of the mortgagor who read the deed omitted to read the name of the mortgagor, the court were inclined to the opinion that the omission rendered the deed invalid, while deciding the case upon other grounds: *Terry v. Tuttle*, 24 Mich. 206.

¹ *McGinn v. Tobey*, 62 Mich. 252; 4 Am. St. Rep. 848.

² *McGinn v. Tobey*, *supra*.

³ *Blaisdell v. Leach*, 101 Cal. 405; 40 Am. St. Rep. 65.

rance of the legal effect, he may have the deed set aside on the ground of fraud, but the deed is not void; it is merely voidable.¹

§ 229. Burden of proof.—When an action is brought to set aside a deed, executed by a person unable to read, for misrepresentation of its contents or effects, the burden of proof rests upon the defendant. In a case of this kind, part of the necessary proof of the execution of the instrument consists in showing that it was read or its contents made known to the grantor. An acknowledgment, however, according to the statute, before an officer designated by the law, is equivalent to proof that the grantor possessed knowledge of its contents, if the acknowledgment contains a certificate that the officer made known the contents to the grantor before acknowledgment.²

§ 230. Effect of an erroneous reading.—The deed of an illiterate man, who is induced to sign it by misrepresentations of its nature and contents, is void. If there be an incorrect reading caused by mistake, the deed cannot stand because he has given his consent to the deed as it was read and not as it was executed.³ An heir is not permitted to avoid a deed by showing that the grantor was old and infirm, that so far as the knowledge of the subscribing witness extended it was not read, and that he saw the payment of no money; nor does the fact that the grantor died in possession affect the case.⁴ But if the failure to read the deed is occasioned by fraud, the law will not impute inexcusable negligence to the grantor, as where a deed is falsely represented, by persons in whom the grantor confides, to be an instrument authorizing the collection of rents, when in fact it is a deed conveying

¹ *Blaisdell v. Leach*, 101 Cal. 405; 40 Am. St. Rep. 65.

² *Hyer v. Little*, 20 N. J. Eq. (5 Green, C. E.) 443. See to some extent, *contra*: *Kimball v. Eaton*, 8 N. H. 391. See *Pool v. Chase*, 46 Tex. 207; *Williams v. Baker*, 71 Pa. St. 476.

³ *Jackson v. Hayner*, 12 Johns. 469.

⁴ *Kimball v. Eaton*, 8 N. H. 391.

the land, and the grantor executes the deed in reliance on such representations without reading it. The deed in equity will be set aside.¹

¹ *Smith v. Smith*, 134 N. Y. 62; 30 Am. St. Rep. 617. But an instrument will not be reformed where there is no mistake, fraud, or concealment, although the plaintiff did not read it when he signed it, and he supposed it was a copy of another instrument that he had signed previously: *Kennerty v. Etiwan Phosphate Co.*, 21 S. O. 226; 53 Am. Rep. 669. See for other cases where relief has been granted or denied on the facts involved: *Pennybacker v. Laidley*, 33 W. Va. 624; *May v. San Antonio etc. Co.*, 83 Tex. 502; *Koons v. Blanton*, 129 Ind. 383.

CHAPTER IX.

THE SIGNATURE.

- § 231. Signing unnecessary at common law.
- § 232. Signing in grantor's presence.
- § 233. Reason for this rule.
- § 234. Opposition to this rule.
- § 235. Absence of grantor.
- § 236. Holding top of pen.
- § 237. Signature by mark.
- § 237 a. Grantor's name written by grantees.
- § 238. Attestation by witness.
- § 239. Comments.
- § 240. Variance in name.
- § 241. Deed *inter partes*.

§ 231. **Signing unnecessary at common law.**—It was not necessary to the execution of a deed at common law that it should be signed, though signing was always advisable.¹ The use of seals among the Saxons was not general. They subscribe their deeds with the sign of the cross appended. With the advent of the Normans, sealing was substituted for signing.² In several of the American States, signing formerly was not necessary to the valid execution of a deed.³ But, as the statute of frauds requires that the instrument be signed, it is believed in most, if not all the States, signing is now an essential requisite of the execution of a deed. There is, however, no particular form for the signing of a deed. It should appear by some writing that the party intended to adopt the instrument as his own, and to be bound by

¹ 1 Wood on Conveyancing, 239; Shep. Touch. (Prest. ed.) 56 n., 60; Martindale on Conveyancing, 163; 3 Wash. Real Prop., 270; Wms. Real Prop., 126.

² 1 Wood on Conveyancing, 191, 192; 2 Blackst. Com. 309.

³ Secard v. Davis, 6 Peters. 124. See Elliott v. Sleeper, 2 N. H. 529.

its terms.¹ But where a written transfer of a bond for a title was not actually signed, the space in the name between the words "her mark" being unfilled, it was held that the party's acknowledgment before a clerk of a court that she had signed it, was not a substitute for the signing required for its execution, nor proof thereof.²

§ 232. **Signing in grantor's presence.**—It is a general rule that a person cannot sign a deed for and as another's agent, unless authority has been given to him under seal.³ But this principle does not apply where the grantee is present and authorizes another, either expressly or impliedly, to sign his name to the deed. It then becomes the deed of the grantor, and is as binding upon him to all intents and purposes as if he had personally affixed his signature.⁴

¹ *Ingoldsby v. Juan*, 12 Cal. 564.

² *Jones v. Gurlie*, 61 Miss. 423. A deed may become operative by the acknowledgment before a proper officer: *Newton v. Emerson*, 66 Tex. 142. A signature may be adopted: *Sellers v. Sellers*, 98 N. C. 13; *Conlan v. Grace*, 36 Minn. 276; 30 N. W. Rep. 880. Where a sheet of legal cap paper consisting of four pages, contains on the first page the body of the deed, on the second, the certificate of acknowledgment of the wife, on the third the certificate of registration, and on the fourth, the signatures of the grantors and witnesses, and the certificate of acknowledgment of the grantors, it is admissible in evidence, so far as the objection that "it is not signed at the foot by the grantors as required by law" is concerned: *Winston v. Hodges*, 102 Ala. 304; 15 So. Rep. 528.

³ *Banorgree v. Hovey*, 5 Mass. 11; 4 Am. Dec. 17; *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529; *Hanford v. McNair*, 9 Wend. 54; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731; *Harrison v. Jackson*, 7 Term Rep. 207; *Cooper v. Rankin*, 5 Binn. 613; *Gordon v. Bulkley*, 14 Serg. & R. 331; *Hunter v. Parker*, 7 Mees. & W. 322. In *Hibblewhite v. McMorine*, 6 Mees. & W. 200, 215, the instrument was executed by the grantor, but contained a blank for the name of the grantee, whose name was afterward inserted by an agent appointed by parol. The instrument was held void because the appointment was not made by deed. It is held, however, in some courts, that a subsequent parol ratification would make a deed effective, executed in blank and filled up by the agent. See *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Cady v. Shepherd*, 11 Pick. 400; 22 Am. Dec. 379; *Gram v. Seton*, 1 Hall, 262; *Story on Partnership*, § 122, n.

⁴ *Jansen v. McCahill*, 22 Cal. 563; 83 Am. Dec. 84; *Videau v. Griffin*, 21 Cal. 389; *Frost v. Deering*, 21 Me. 156; *Burns v. Lynde*, 6 Allen, 309;

§ 233. **Reason for this rule.**—This rule is placed upon the ground that the act of signing and sealing is to be deemed as much his personal act as if he held the pen and his hand was guided by another. In a case in Massachusetts, the grantor gave her assent to her daughter's signing for her by a nod. The daughter signed the deed, "Polly Gwinn, by Mary G. Gardner." Chief Justice Shaw, who delivered the opinion of the court, said: "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hands of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. To hold otherwise would be to decide that a person having a full mind and clear capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent her from executing a letter of attorney under seal."¹

Goodell v. Bates, 14 R. I. 65; *Ball v. Dunsterville*, 4 Term Rep. 313; *Pierce v. Hakes*, 23 Pa. St. 231; *Mutual etc. Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Gardner v. Gardner*, 5 Cush. 483; 52 Am. Dec. 740; *King v. Longnor*, 4 Barn. & Adol. 647; *Lovejoy v. Richardson*, 68 Me. 386; *Lord Lovelace's case*, Jones, W. 268; *Conlan v. Grace*, 36 Minn. 276; 30 N. W. Rep. 880; *Harris v. Harris*, 59 Cal. 620; *Reinhart v. Miller*, 22 Ga. 402; 68 Am. Dec. 506; *Schmitt v. Schmitt*, 31 Minn. 106; *Devereux v. McMahon*, 108 N. C. 134; *Nye v. Lowry*, 82 Ind. 316; *Cushman v. Wooster*, 45 N. H. 410; *Bird v. Decker*, 64 Me. 550; *Lewis v. Watson*, 98 Ala. 479; 39 Am. St. Rep. 82; *Rockford R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101.

¹ *Gardner v. Gardner*, 5 Cush. 483; 52 Am. Dec. 740; *Irvin v. Thompson*, 4 Bibb, 295. A letter authorizing the sale of land had been signed with the name of a party, at her request, by another person, and it was sought to enforce a contract for the sale of that land made by the attorney appointed by that letter. The court held that the power was sufficient, though the principal did not actually sign, saying: "To construe the statute to require an authority to make a contract for the sale of land to be in writing and signed by the party giving such authority, would in effect prevent any person who is unable to write from making a binding contract. Such an effect cannot be presumed to have been within the intent of the legislature to produce by the statute."

§ 234. **Opposition to this rule.**—This doctrine, however, has not been universally acquiesced in. In a case in South Carolina, it was said that, as the statute relating to the execution of wills permitted a signature by the testator, or “by some other person in his presence, or by his express direction,” and the statute applying to conveyances did not contain this alternative, it showed that it was not the intention of the legislature to permit an execution of a deed in this manner.¹ Mr. Browne, also, in his treatise on the Statute of Frauds, dissents from the view that a signature in the presence of the grantor is good, but admits the rule to be as stated in the text. He says: “Upon the whole, however, the drift of judicial opinion is so strong in the direction given to the law by *Gardner v. Gardner*,² that it must now apparently be considered settled that a conveyance of an estate in land is well signed, as the conveyance of the principal under the statute, if the grantor’s name be affixed by another *in the grantor’s* presence, and by his oral direction, whether there be any physical incapacity on his part or not. The cases are to be supported, it seems, only on the ground that such an execution is to be regarded not at all as an execution by attorney (for which the statute requires a written authority), but as an execution by the principal in a manner sufficient at common law, and not controlled by the language of the statute.”³

¹ *Wallace v. McCullough*, 1 Rich. Eq. 426. And see *Rockford etc. R. R. Co. v. Shunick*, 65 Ill. 223.

² 5 Cush. 483; 52 Am. Dec. 740.

³ *Browne Stat. Frauds* (4th ed.) § 12 b. In *Mutual Ben. Life Ins. Co. v. Brown*, 30 N. J. Eq. (3 Stewart), 193, the Vice-Chancellor says (p. 203): “A person physically unable, or too illiterate, to write his name, may sign by making a cross, a straight or a crooked line, a dot, or any other symbol. Simply making a mark by bringing the pen in contact with the paper is sufficient. The right to sign in any of these modes, cannot, in principle, depend wholly upon the question of capacity. I do not believe the legislature intended to give any such extraordinary virtue to the mere physical act of touching a pen to paper as to mean that a deed should be valid if it was done, but invalid if it was not done, though the grantor adopted the signature made for him by a delivery of the deed, and an acceptance of the consideration. The essential ingredient of the

§ 235. **Absence of grantor.**—If the deed is to be made in the grantor's absence, the authority to execute it must be conferred by an instrument in writing.¹ But it has been held that a person recognizes and adopts a signature as his own, made to a deed by his wife in his absence, by acknowledging the deed before an officer.² Although the grantor's name may be signed to the deed without his authority, his subsequent acknowledgment of the deed will make it effectual against him.³

§ 236. **Holding top of pen.**—As the principle that as a signature is sufficient if made by another in the grantor's presence at his request is established, it is apparent that the proposition that if the grantor holds the top of the pen while another is writing his signature for him, the grantor is bound, is still more clear and undisputed.⁴

§ 237. **Signature by mark.**—A signature by mark is sufficient though the party be able to write. "The grantor's adoption of a signature by affixing his mark thereto, the deed being in other respects regular, is as effective to transfer the estate as if his name had been written thereon in full by himself."⁵ In a case where a party had put his mark to a will, evidence was given to prove that he could write, but it was held that that fact was immaterial

transaction, in the language of Chief Justice Shaw, is the disposing purpose, an intention, by act done or directed, to divest himself of title and pass it to the grantee. If this is the purpose of the grantor's mind, the deed is his, though his name be traced by the hand of another."

¹ *McMurtry v. Brown*, 6 Neb. 368.

² *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Rep. 101; *Greenfield Bank v. Crafts*, 4 Allen, 447. There may be a parol ratification of an unauthorized execution of a deed of a partnership or of an individual: *Holbrook v. Chamberlin*, 116 Mass. 155; 17 Am. Rep. 146. One who has adopted the signature made by another is estopped to deny that it is his signature: *Clough v. Clough*, 73 Me. 487; 40 Am. Rep. 386. See, also, *Nye v. Lowry*, 82 Ind. 316.

³ *O'Donnell v. Kelliher*, 62 Ill. App. 641.

⁴ *Harris v. Harris*, 59 Cal. 620; *Johnson v. Davis*, 95 Ala. 293; *Mash v. Daniel* (Ala. Feb. 4, 1895) 18 So. Rep. 8.

⁵ *Truman v. Love*, 14 Ohio St. 144, 154, per Peck, J.; *Devereux v. McMahon*, 108 N. C. 134; *Mackay v. Easton*, 19 Wall. 619.

and the will was sufficiently signed.¹ Where a signature is made by mark, and the statute does not require the person writing the name of the grantor to write his own name as a witness, it should seem that no attestation is necessary. This is the rule with reference to promissory notes.²

§ 237 a. **Grantor's name written by grantee.**—Any one may write the grantor's name if the latter makes his mark. The mark constitutes his signature, and his name may be written by the grantee.³ "It is immaterial," said Mr. Justice McClellan, "by whom the name is written; it cannot be written by the grantor, nor, standing alone, could it be the signature of the grantor. His signature is his mark, and the requirements of law are fully satisfied, if, finding his name subscribed to an instrument, he set his mark near it. The sole purpose of the name being there at all is by way of identifying and individualizing the mark; and this purpose can be as fully subserved when the name is written, as is by no means unusual in practice, by the other party to the contract, as by

¹ *Baker v. Dening*, 4 Ad. & E. 94. Coleridge, J., said: "I should be sorry if our decision were to lead to the practice of substituting a mark for a name, for this might give much opportunity for fraud. But here we are on the question of law whether, if a party make his mark, that be a signature, although he could have written his name. How can we say that it is not, when we look at the statute and find what is admitted in argument? The statute has only the word "signed," and it is admitted that in some cases this is satisfied by a mark. When I consider the inconvenience which would result from inquiring in all cases whether the party who has made a mark could write at all, or could write at the particular time, I think it would be wrong to raise a doubt by granting the rule."

² *Hilborn v. Alford*, 22 Cal. 482; *George v. Surrey*, Moody & M. 516; *Shank v. Butsch*, 28 Ind. 19; *Willoughby v. Moulton*, 47 N. H. 205. Judge Story, in his treatise on Promissory Notes, section 11, says: "The signature must be in the handwriting of the party executing it, or if it be by the mark of the maker, that mark must be verified by the handwriting or attestation of some person who acts for the marksman or attests it at his request." But he is not borne out in the statement by authority: See *Devereux v. McMahon*, 108 N. C. 134; *Sellers v. Sellers*, 98 N. C. 13.

³ *Johnson v. Davis*, 95 Ala. 293.

a stranger; the act of either in so doing being as purely clerical as writing the body of the paper.”¹ Where a mortgage is made to a firm and the mortgagor, being unable to write, a member of the firm writes the mortgagor’s name, and when his mark was being made by such member of the firm, the mortgagor holds the top of the pen, the making of the mark with the intention on the part of the mortgagor to execute the instrument is his act and constitutes his signature to the instrument.² It was said in one case that a promisee cannot become the agent of the promisor, and that where a note or other written contract is signed by the maker by mark only, his name being written for him by the payee, the instrument is not validly executed.³ But in a later case in the same State it was held that the authorities cited in the case mentioned all referred to instances where the obligee had acted as the agent of the obligor in the *execution* of the instrument, and the latter was able to write.⁴ A mark may be of such a character that its genuineness can be as easily proven as that of a signature.⁵ The law favors those who are illiterate, and will try to ascertain and effectuate their true intent by a liberal application of all technical rules.⁶

§ 238. **Attestation by witness.**—In several of the States signature is defined as including a mark, “when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness.” The question as to whether it is essential that the witness should also write his name to insure the due execution of the deed has not directly arisen or been authoritatively decided in any case that has come within

¹ Johnson *v.* Davis, 95 Ala. 293.

² Mash *v.* Daniel, 105 Ala. 393.

³ Carlisle *v.* Campbell, 76 Ala. 247.

⁴ Johnson *v.* Davis, 95 Ala. 293.

⁵ Devereux *v.* McMahon, 108 N. C. 134; State *v.* Byrd, 93 N. C. 624; Tatom *v.* White, 95 N. C. 453.

⁶ Devereux *v.* McMahon, *supra*.

our observation. In Alabama, the court, referring to this provision of the statute, says: "A subscription or signature to any instrument by mark at common law is sufficient; and if it is not an instrument the execution of which must be attested by a witness or witnesses, the absence of an attestation would not detract from its sufficiency, though proof of execution, when it becomes necessary to prove it, is thereby rendered more difficult.¹ The statutory provision we are considering does not negative expressly the validity of instruments signed or subscribed by mark, and not attested; yet, as it introduces a new rule in reference to subscriptions or signatures, we think it must be construed as implying a negative of the sufficiency of unattested signatures or subscriptions by mark of all instruments falling within its purview. When a statute limits a thing to be done in a particular manner, it includes in itself a negative, and the negative is that it shall not be done otherwise. The limitation exists whenever the statute prescribes the particular manner in which the thing must be done."²

§ 239. **Comments.**—The case cited, however, was one involving the validity of a mortgage of personal property.

¹ Citing *Baker v. Dening*, 8 Ad. & E. 94; 3 Wash. Real Prop. 244; *Wimberly v. Dallas*, 52 Ala. 196; *Bailey v. Bailey*, 35 Ala. 687.

² *Bickley v. Keenan*, 60 Ala. 293, 295, per Brickell, C. J. It is held that where all of the will, including the name of the testatrix, is written by a subscribing witness, and the will is signed by a mark made by the testatrix, without the repetition of the name in immediate connection with the mark, the mark is a sufficient signature: *In re Guilfoyle*, 96 Cal. 598. Where a witness to a will subscribes the name of the testator made in his presence and at his request, although he omits to write his own name near by as a witness to the signature of the testator, still it is a sufficient execution of the will: *Estate of Langan*, 74 Cal. 353. But it is held also that a person who signs a testator's name to a will must subscribe his own name as a witness, and state that he subscribed the testator's name at his request: *McGee v. Porter*, 14 Mo. 611; 55 Am. Dec. 129; *St. Louis Hospital Assn. v. Williams*, 19 Mo. 609; *Northcut v. Northcut*, 20 Mo. 266; *Simpson v. Simpson*, 27 Mo. 288; *Catlett v. Catlett*, 55 Mo. 341. See, also, *Asay v. Hoover*, 5 Pa. St. 21; 45 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 444; 47 Am. Dec. 418; *Greenough v. Greenough*, 11 Pa. St. 489; 51 Am. Dec. 567.

As the court held that a mortgage of personal property was good whether contained in writing or not, its remarks cannot be received as authority. If this conclusion be the proper one, and it is difficult to see how any other can be reached if effect be given to the language of the statute, it would follow that if the person had not made his mark, the execution would be perfect for the reasons given in a preceding section. The distinction, however, may be placed on the ground that where the grantor requests another to write his name, and it is done in the grantor's presence, it is the grantor's act; while, in the other case, the attestation of a subscribing witness is an essential element of a proper signature when it is made under the conditions specified in the statute.

§ 240. **Variance in names.**—If a person is designated by his proper name in the body of the deed and in the certificate of acknowledgment, the deed is not invalidated by the fact that he signs it by a wrong name.¹ The identity of the person in such a case should be proved before the deed is admitted in evidence.² Where the signature is a forgery no title passes, and notice of the forgery is not necessary to make the deed a nullity.³ If there are two grantors in a deed, one of whom acts as the attorney in fact for the other, such attorney must sign his name twice, once as attorney in fact for the grantor for whom he acts, and once for himself. One signature and a second seal is not equivalent in a case of this character to a second subscription.⁴ A forged deed is void, and its registration

¹ *Middleton v. Findla*, 25 Cal. 76. For a fuller discussion of this subject, see section 183, *ante*, and notes.

² *Tustin v. Faught*, 23 Cal. 237.

³ *Cole v. Long*, 44 Ga. 579. If a party signs a deed under the belief that it is a duplicate copy of a lease, when a duplicate copy is to be signed, and both instruments were placed before him, the deed is a forgery and no title passes: *McGinn v. Tobey*, 62 Mich. 252; 4 Am. St. Rep. 848.

⁴ *Meagher v. Thompson*, 49 Cal. 189. In this case the question was whether the husband had given his consent to the wife's conveyance, as required by the statute in force at the time the deed was executed. She

cannot affect the owner's title.¹ A party is not estopped from asserting that a deed is forged because it has been of record for years with his knowledge.² Where it is claimed that a deed has been forged, the subsequent conduct of the grantor, whether he made any claim to the property, paid taxes, or performed any act indicating ownership, may be considered.³

§ 241. **Deed inter partes.**—If one of the conditions of a deed is that a certain number of persons shall sign it, and the deed is not signed by all, it is inoperative. Thus, several tenants in common were named as parties to a deed of partition, by which each party conveyed his interest in the land held in common to the others, in consideration of a deed to him of a certain designated

signed his name to it, adding the words, "by his attorney in fact," and then signed her own, but only once. The decision, however, was based for the most part upon the proposition that the husband was compelled to sign the deed himself, and could not delegate the power to another. Said the court: "Assuming that the purpose of the statute was the protection of the wife, this protection can be made effectual only by requiring the husband to exercise his judgment in respect to each transaction of the wife with respect to her real estate. No sale shall be valid unless consented to by the husband. The signing of the instrument in writing by the husband is made evidence of his assent to the sale, as well as to the conveyance, but the power of attorney which purports to authorize the wife in advance to make any sale, 'for such sum or price, and on such terms' as she might deem proper, cannot be made to operate as an abdication by the husband of that discretion which he was bound to exercise. The duty imposed by law on the husband required the employment of a discretion which he could not delegate; which he was compelled to exercise himself, and in a particular manner, the mode entering into and forming part of his obligation. 'He must not only assent in fact, but he must manifest his assent by his signature to the instrument in writing. The statute has, in effect, prescribed that the only evidence competent to prove his assent is his signature, which must appear on the face of the instrument': *Dow v. G. & C. M. Co.*, 31 Cal. 629."

¹ *Haight v. Vallett*, 89 Cal. 245; 23 Am. St. Rep. 465.

² *Meley v. Collins*, 41 Cal. 663; 10 Am. Rep. 279.

³ *Haight v. Vallett*, 89 Cal. 245; 23 Am. St. Rep. 465. Where an instrument purports to be the deed of a woman and her former husband, and is shown to have been executed by the husband, it is admissible in evidence as the husband's deed in favor of one who claims title under it, though it is a forgery as to the woman: *Murphy v. Reynaud*, 2 Tex. Civ. App. 470; 21 S. W. Rep. 991.

portion. All the parties named in the deed did not sign it, and the deed was therefore held to be inoperative, and the partition attempted to be made by it void.¹ But whether a deed intended to be signed by several, but not signed by all, is to be considered as the deed of those who do sign it, must be determined by the intention of the parties, whether those signing it intended it as an escrow only until signed by the others, or executed it as their deed.²

¹ *Emeric v. Alvarado*, 64 Cal. 529, and cases cited.

² *Haskins v. Lombard*, 16 Me. 140; 33 Am. Dec. 645.

CHAPTER X.

THE SEAL.

- § 242. History of the use of seals.
- § 243. Definition.
- § 244. Seal stamped upon paper.
- § 245. Seal essential at common law.
- § 246. In equity.
- § 247. Seal required unless dispensed with by statute.
- § 248. Abolition of distinction between sealed and unsealed instruments.
- § 249. Effect of these statutes.
- § 249 a. Such statutes not retroactive.
- § 250. Use of scrolls.
- § 251. Rule in Delaware, Indiana, Iowa, Louisiana, Missouri, and Virginia.
- § 252. In Mississippi.
- § 253. In Tennessee.
- § 254. Several persons may bind themselves by one seal.

§ 242. History of the use of seals.—It would be almost impossible to trace the history of seals back to the time when they were first employed. We have instances in very remote antiquity where seals were used in the place of signatures for the purpose of giving effect and authenticity to acts. We find the recognition of seals at an early day in this sentence from Ahasuerus to Esther, the queen: "Write ye also for the Jews as it liketh you in the king's name, and seal it with the king's ring; for the writing which is written in the king's name and sealed with the king's seal may no man reverse."¹ And again it is said that Jezebel, wife of Ahab, king of Samaria, "wrote letters and sealed them with his seal."²

¹ Bible, Esther, ch. 8, v. 8.

² Bible, 1 Kings, ch. 21, v. 8. Another illustration occurs in the Book of Jeremiah: "And I bought the field of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in

The use of seals was common in the civil law, and they were especially required in the attestation of testaments.¹ The extent to which the use of seals prevailed among the early Saxons is thus stated by Blackstone: "But in the times of our Saxon ancestors they were not much in use in England. For though Sir Edward Coke relies on an instance of King Edwin's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation, and perhaps the charter he mentions may be of doubtful authority, from this very circumstance of being sealed, since we are assured by all our ancient historians that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and whether they could write or not, to affix the sign of the cross, which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Cerdwalla, a Saxon king, at the end of one of his charters. In like manner, and for the same unsurmountable reason, the Normans, a brave but illiterate nation, at their first settlement of France, used the practice of sealing only, without writing their names, which custom continued when learning made its way among them, though the reason for doing it had ceased. And hence, the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England. At the conquest, the Norman lords brought over into this kingdom their own fashions, and introduced waxen seals only, instead of the English method of writing their names, and signing with the seal of the cross. And in the reign of Edward I., every

the balances. And I took the evidence of the purchase, both that which was sealed according to the law and the custom, and also that which was open": Ch. 32.

¹ 2 Blackst. Com. 305; 4 Kent's Com. 453.

freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals. The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the holy land. . . . This neglect of signing and resting only upon the authenticity of seals remained very long among us, for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds *sealed* and delivered, continues to this day.”¹

¹ 2 Blackst. Com. 305. “And because we are about sealing and signing of deeds, it shall not be much amiss here to show you, for antiquity’s sake, the manner of signing and subscribing deeds in our ancestors, the Saxons’ time, a fashion differing from that we use now in this, that they to their deeds subscribed their names (commonly adding the sign of the cross), and in the end did set down a great number of witnesses, not using at that time any kind of seal. And we at this day, for more surety both subscribe our names, though that be not very necessary, and put to our seals, and use the help of witnesses besides. That the former fashion continued absolute until the time of the conquest by the Normans, whose manners by little and little at the length prevailed amongst us. For the first sealed charter in England is thought to be that of Edward the Confessor to the Abbey of Westminster, who, being educated in Normandy, brought into the realm that and some other of their fashions with him. And after the coming of William the Conqueror, the Normans, liking their own country custom (as naturally all nations do), rejected the manner that they found here, and retained their own, as Ingulphus, the Abbot of Croiland, who came in with the conquest, witnesses, saying: ‘The Normans do change the making of writings (which were wont to be firmed in England with crosses of gold, and other holy signs) into an impression of wax, and reject also the manner of the English writing.’ Howbeit this was not done all at once, but it increased and came forward by certain degrees, so that first and for a season the king only, or a few other of the nobility, used to seal; then the noblemen for the most part, and none other, which thing a man may see in the history of Battle Abbey, where Richard Lucie, Chief Justice of England, in the time of King Henry II, is reported to have blamed a mean subject, for that he used a private seal, whereas that pertained (as he said) to the king and nobility only”: *Termes de la Ley*, 149. Mr. Layard, in his “Discoveries in the Ruins of Ninock and Babylon, part i., p. 153, gives some instances of ancient seals. He says: “Other corroborative evidence, as to the identity of the king who built the palace of Kouyunjik with Sennacherib,

§ 243. **Definition.**—One of the definitions given of a seal is, “an impression upon wax, wafer, or some other tenacious substance capable of being impressed.”¹ Lord Coke defined a seal as wax with an impression. “It is required,” he says, “that the deed, charter, or writing must be sealed, that is, have some impression upon the wax; for *sigillum est cera impressa, quia cera sine impressione non est sigillum*, and no deed, charter, or writing can have the force of a deed without a seal.”² But it is not requisite, it has been held in some of the States, that the impression to constitute a good seal should be apparent.³ A piece of paper attached to an instrument with mucilage is good as a common-law seal.⁴ So a piece of colored paper which has been affixed as a seal, but which bears no impression, has been held good as a seal.⁵

is scarcely less remarkable. In a chamber or passage in the southwest corner of this edifice were found a large number of pieces of fine clay, bearing the impressions of seals which there is no doubt had been affixed, like modern official seals of wax, to documents written on leather, papyrus, or parchment.”

¹ Bouv. Law Dict. tit. Seal.

² 3 Inst. 169. See, also, *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Warren v. Lynch*, 5 Johns. 239; 3 Caines, 362; *Beardsley v. Knight*, 4 Vt. 471; *Tusker v. Bartlett*, 5 Cush. 359, 364; *Bradford v. Randall*, 5 Pick. 496. Chancellor Kent says: “The common law intended by a seal an impression upon wax or wafer or some other tenacious substance capable of being impressed:” 4 Kent’s Com. 452.

³ *Hughes v. Debnam*, 8 Jones (N. C.) 127; *Pease v. Lawson*, 33 Mo. 35. A printed seal has been held insufficient: *Richard v. Boller*, 6 Daly, 460.

⁴ *Gillespie v. Brooks*, 2 Redf. 349.

⁵ *Turner v. Field*, 44 Mo. 382. See *Pease v. Lawson*, 33 Mo. 35. The seal was described in the bill of exceptions, thus: “It appeared on inspection that there was no scrawl by way of seal made with pen or pencil, but there was a small round piece of paper cut into scallops on the edges attached to the end of the name, the usual place for a seal with a wafer, but no impression made thereon.”

Dryden, J., delivering the opinion of the court, said with reference to the sufficiency of the seal: “The common-law seal, which was ‘an impression upon wax or wafer or some other tenacious substance capable of being impressed,’ has become well-nigh obsolete in this and many other States of the Union, the statutory ‘scrawl by way of seal’ having almost entirely superseded it. Yet a seal of the one or the other sort is still requisite (and either is sufficient) to constitute a document a sealed instrument. In this case it is not pretended the statutory mode was

§ 244. Seal stamped upon paper.—A seal stamped upon paper instead of upon wax or wafer has been held sufficient. “Formerly wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said: *Sigillum est cera impressa, quia cera, sine impressione non est sigillum*. But this is not an allegation that an impression without wax is not a seal. And for this reason courts have held that an impression made on wafers or other adhesive substance capable of receiving an impression, will come within the definition of *cera impressa*. If then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machine now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it.”¹

adopted, so that unless what was done comes up to the common-law standard, the letter of attorney is not a sealed instrument in the sense of the law. Does it then reach this standard? The point of the objection is that no *impression* was made on the wafer, and so although everything else had happened necessary to a valid sealing, yet the want of the crowning requisite was fatal. Now, as in the days of the greatest strictness, the common law prescribed no particular instrument with which to make the impression, nor fixed the breadth or length or depth it should be made; and as the execution of this paper was attended with the usual circumstances of deliberation, and as it was manifestly intended as a sealed instrument, and as the scalloped paper when applied to the wafer and caused to adhere must from a physical necessity have made an impression, we feel warranted for the effectuation of the clear intentions of the parties in regarding the scalloped paper a sufficient instrument, and the impression made by it to cause cohesion, a sufficient impression to comply with the requirement of the law.”

¹ Mr. Justice Grier, in *Pillow v. Roberts*, 13 How. 473; s. c. 7 Eng.

§ 245. **Seal essential at common law.**—At common law, sealing was considered indispensable to the valid execution of a deed¹ which was intended to transfer a freehold interest.² Where a seal of some character is required, an instrument, although intended to operate as a deed, and purporting on its face to be under seal, is, nevertheless, not a deed if it lacks a seal or a scroll.³ In a case in Pennsylvania, where a writing was not actually sealed, though purporting to be under seal, the court, speaking

(12 Ark.) 822. But in *Bank of Rochester v. Gray*, 2 Hill, 227, it was held that the New York statute authorizing seals of courts and officers to be made by directly impressing the paper, had no extraterritorial force, and therefore was inapplicable to a notarial protest of another State; it was also held that at common law a seal must be impressed upon wax, wafer, or other tenacious substance, and that a mere stamp on paper was insufficient. And in *Farmers and Mechanics' Bank v. Haight*, 3 Hill, 493, it was held under the New York statute that the seal of a religious corporation impressed directly upon paper, without the use of wax or some other tenacious substance, was a nullity. In *Carter v. Burley*, 9 N. H. 558, where a protest was made by a notary under what purported to be an official seal, the court said: "It is not a mere scrawl, but a distinct impression upon the paper showing the character of the notarial seal. Nothing would have been added to its character by wafer or wax, and as this is not an uncommon mode of affixing official seals, we are of opinion that it is sufficient. It is to be presumed from the production of the instrument itself that it was duly affixed, according to the laws of Pennsylvania, until there is something to impeach it." In *Allen v. Sullivan R. R. Co.*, 32 N. H. 446, the court observed: "It seems to us, then, that there is nothing necessary to constitute a seal but some material of a suitable character to receive an impression, and an impression bearing the character of a seal upon it. For other cases as to what will operate as a common-law seal, with reference to various instruments, see *Jones v. Longwood*, 1 Wash. (Va.) 42; *Connolly v. Goodwin*, 5 Cal. 220; *Follett v. Rose*, 3 McLean, 332, 335; *Bank of Manchester v. Slason*, 13 Vt. 334; *Corrigan v. Trenton Co.*, 1 Halst. Ch. 52; *Beardsley v. Knight*, 4 Vt. 471, 479; *Curtis v. Leavitt*, 17 Barb. 309, 318; *Ross v. Bedell*, 5 Duer, 462; *Sprange v. Barnard*, 2 Bro. C. C. 585; *Regina v. St. Paul*, 7 Q. B. (Ad. & E., N. S.), 232." See, also, *Commonwealth v. Griffith*, 2 Pick. 11; *Bradford v. Randall*, 5 Pick. 495; *Bates v. Boston etc. R. R. Co.*, 10 Allen, 251.

¹ Wood on Conveyancing, 192; 3 Wash. Real Prop. 271.

² *Jackson v. Wood*, 12 Johns. 242; 7 Am. Dec. 315; *McCabe v. Hunter*, 7 Mo. 355; *Cline v. Black*, 4 McCord, 431; *Underwood v. Campbell*, 14 N. H. 393; *Jackson v. Wendell*, 12 Johns. 355; *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374.

³ *Alexander v. Polk*, 39 Miss. 737.

of the necessity for a seal, said, with reference to that instrument, and its language is equally applicable to deeds, that "it has been heretofore decided that any mark made by the pen in imitation of a seal may be considered as a seal. The usual mode is to make a circular, oval, or square mark, opposite to the name of the signer, but the shape is immaterial. Something, however, there must be intended for a seal, and the writing must be delivered as a deed. Although in this and many of our sister States the law has been somewhat relaxed in favor of custom and convenience in doing business, yet the relaxation is confined to the *manner* of making a seal. Sealing and delivering is still the criterion of a specialty. . . . If it should be thought that, in the present state of society, it would be best to put all writings on the same footing, the legislature alone has power to accomplish it. Many, however, are of opinion that it is useful to allow greater efficacy to writings executed with greater solemnity; and it is certain that even the lower orders of the people understand and feel the solemnity of delivering a writing as their act and deed, and of affixing only the resemblance of a seal, and having the execution attested by subscribing witnesses. . . . I will premise that two principles are, in my opinion, well founded. One, that although in the body of the writing it is said that the parties have set their hands and seals, yet it is not a specialty unless it be actually sealed and delivered. Another, that if it be actually sealed and delivered, it is a specialty, although no mention be made of it in the body of the writing. The *fact*, and not the assertion, fixes the nature of the instrument."¹

§ 246. **In equity.**—Although the conveyance may be defective for want of a seal, it is good so as to bind in

¹ Taylor v. Glaser, 2 Serg. & R. 502, per Telghman, C. J. See, also, Warren v. Lynch, 5 Johns. 239; Deming v. Bullitt, 1 Blackf. 241; Davis v. Judd, 6 Wis. 85; Wadsworth v. Wendell, 5 Johns. Ch. 224; Davis v. Brandon, 1 How. (Miss.) 154. And see, also, McCarley v. Tappah County Supervisors, 58 Miss. 483; 38 Am. Rep. 238.

equity the lands conveyed in the hands of the grantor and his heirs, and is good also against a subsequent purchaser who has notice of the prior defective deed.¹ "It is clear that where there is an agreement to convey, or a defective conveyance by a person then actually having title, that would be such an equity as would bind the lands in the hands of the heir."² If a seal is actually affixed to the deed, the absence of the customary recital, that the party has set his seal thereto, does not affect the conveyance.³

§ 247. Seal required unless dispensed with by statute.—In those States where the common law prevails, and where there is no statutory provision to the contrary, a seal is essential to make an instrument a deed of conveyance. With reference to the law in California, prior to the abolition by statute of the distinction between sealed and unsealed instruments, it was said: "There is no doubt that a seal is essential to a conveyance of real property. There may be certain possessory rights to mines and water privileges on the public lands, which are held in this State to pass by simple unsealed bills of sale, but these are exceptional cases. The general doctrine with reference to instruments by which real property is transferred is the same in California as in other States—the instruments must be sealed. The transfer *inter vivos* can only be made by deed, and a deed implies sealing; its definition is 'a writing, sealed and delivered by the parties.'"⁴

¹ Wadsworth v. Wendell, 5 Johns. Ch. 224; McCaleb v. Pradat, 25 Miss. 257; Tom v. Sayers, 64 Tex. 342; Martin v. Weyman, 26 Tex. 460; Miller v. Alexander, 8 Tex. 36; Grandin v. Hernandez, 29 Hun, 399; Jewell v. Harding, 72 Me. 124; Bunkley v. Bethel, 9 Heisk. 786; Frost v. Wolf, 77 Tex. 455; 19 Am. St. Rep. 761; Pratt v. Clemens, 4 W. Va. 443. See Dreutzer v. Baker, 60 Wis. 179; Frost v. Wolf, 77 Tex. 455; 19 Am. St. Rep. 761; Rutland v. Paige, 24 Vt. 181.

² Morse v. Faulkner, 1 Anstr. 14. See, also, Martin v. Seamore, 1 Cas. Ch. 170; Daniel v. Davison, 17 Ves. 433.

³ Bradeford v. Randall, 5 Pick. 496; Taylor v. Glaser, 2 Serg. & R. 502; Mill Dam Foundry v. Hover, 21 Pick. 417.

⁴ Mr. Justice Field, in Le Franc, 5 Sawy. 603. It was held that where the original could not be produced, a seal to the original will be presumed

§ 248. **Abolition of distinction between sealed and unsealed instruments.**—In some of the States, the distinction between sealed and unsealed instruments has been abolished, and a seal is not essential to the valid execution of a conveyance. In Alabama, it is provided: "A seal is not necessary to convey the legal title to lands to enable the grantee to sue at law; any instrument in writing signed by the grantor, or his agent having a written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor to be collected from the whole instrument."¹ It is also declared: "All writings which import on their face to be under seal are to be taken as sealed instruments, and have the same effect as if the seal of the parties was affixed thereto."² By statute the consideration of sealed instruments may be inquired into.³ In California, under the Code, an estate may be transferred by an instrument in writing subscribed by the party disposing of the same or by his agent thereunto authorized by writing.⁴ The

from the statement in the concluding clause that the grantor affixed his seal, and from the attestation clause stating the sealing of the instrument in the presence of witnesses: *Le Franc*, 5 Sawy. 603. See *Smith v. Dall*, 13 Cal. 510; *Pratt v. Clemens*, 4 W. Va. 443. A writing with a seal is implied by the term "deed," and the seal is essential to make it a deed: *Taylor v. Morton*, 5 Dana, 365; *Davis v. Brandon*, 1 How. (Miss.) 154; *Jones v. Crawford*, 1 McMull. 373. From the recital in an administrator's deed from the office of the recorder, that the deed was executed under the hand and seal of the administrator, it will be presumed that the original deed was under seal though the certified copies do not show a seal or scroll: *Macey v. Stark*, 116 Mo. 481; 21 S. W. Rep. 1088. Where deeds were executed in 1800 and 1838, and were signed, sealed, acknowledged, and verified according to the registry acts then in force, and were recorded as being in compliance with the statute, it was held that they passed the legal title, although no seals appeared upon the deeds when offered in evidence many years afterwards, the court presuming that the waxen seals in use at the time of the execution and liable to be effaced were properly attached: *Reusens v. Staples* (C. C.), 52 Fed. Rep. 91. See, also, *Todd v. Union Dime Sav. Inst.*, 118 N. Y. 337; *Carrington v. Potter*, 37 Fed. Rep. 767; *McCoy v. Cassidy*, 96 Mo. 429. See, also, § 700, *post*,

¹ Ala. Code, 1877, § 2948.

² Ala. Code, § 2194.

³ Ala. Code, § 2981.

⁴ Cal. Civil Code, §§ 1091, 1092.

code also declares: "All distinctions between sealed and unsealed instruments are abolished."¹ "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal."² "There shall be no difference hereafter in this State between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged by a writing not under seal."³ These statutes indicate the modern tendency to make the transfer of real estate easy, and to regard land as much an object of barter as other commodities.⁴

§ 249. **Effect of these statutes.**—The effect of these statutes is simply to dispense with the necessity of affixing a seal to a deed; but in other respects, as for instance with reference to the doctrine of estoppel, the deed retains the incidents it possessed as a sealed instrument at common law. Commenting upon the statute in Alabama, the court observes: "The common law required more form and solemnity in the conveyance of lands than in the transfer of chattels. The freehold could not pass, after conveyances by writing became the usual mode of transfer, unless the conveyance was under the seal of the grantor. A writing not under seal would create equities if founded on a valuable consideration, but of these courts of law could not take notice. The freehold was of greater dignity than personal property, title to which could pass by mere words of delivery. This principle of the common law was frequently recognized in this court, and instruments creating equities perfect in themselves, were declared insufficient to pass the legal estate, and, therefore insufficient to support ejectment."⁵ The statute ex-

¹ Cal. Civil Code, § 1629.

² Cal. Code Civil Procedure, § 1933.

³ Cal. Code Civil Procedure, § 1932. A private seal may be made by scroll: Code Civil Procedure, § 1931.

⁴ See Kentucky Gen. Stats. 1824, ch. 22, § 2; Texas Rev. Stats. 1879, art. 4487; *Goodlett v. Hansell*, 56 Ala. 346; *Pierson v. Armstrong*, 1 Iowa, 282, 293; 63 Am. Dec. 440; *Simpson v. Mundee*, 3 Kan. 172; *Courand v. Vollmer*, 31 Tex. 397. See, also, *Bower v. Chambers*, 53 Miss. 259.

⁵ *Ansley v. Nolan*, 6 Port. 379; *Thrash v. Johnson*, 6 Port. 458.

pressly dispenses with a seal as necessary to convey the legal title to enable the grantee to sue at law, and by its terms meets and obviates the insufficiency of the instruments which in the cases referred to was fatal to a recovery in ejectment, compelling suits in the name of the grantor to recover lands held adversely, and compelling a resort to equity, if the grantor would not voluntarily, or if he were dead and could not by a legal conveyance perfect the title. If these were the only words of the statute, its only effect would probably be to enable the grantee of lands by an instrument not under seal, to sue at law as if the conveyance was under seal, not dispensing with a seal as an indispensable element of a legal conveyance for all purposes. There are other words, however, indicative of a larger legislative intention, rendering effectual any instrument in writing to transfer the legal title to lands, if such was the intention of the grantor to be collected from the entire instrument. Former sections of the code prescribe with particularity the essentials of conveyances for the alienation of lands, and of these, are an attestation by witnesses, or an acknowledgment of execution before a proper officer, not essentials at common law.¹ When those several statutes are construed in connection, as they must be, we cannot doubt it was intended to dispense with a seal as an element of a legal conveyance of lands, and to leave the sufficiency of every instrument in writing, for that purpose, which is executed in the prescribed mode, dependent on the intention of the grantor, as it may be collected from the terms of the instrument. . . . Though a seal may not now be necessary to a conveyance of a legal estate in lands, yet the instrument, the *deed of conveyance*, which it must still be termed, though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law. Its covenants may be as comprehensive, and whatever they may be, are as obligatory, and its recitals are as incapable of being gainsaid, as if it were sealed with the greatest

¹ Code of 1876, §§ 2145, 2146.

formality. The estoppel which a sealed instrument or its covenants created at common law, is now claimed by the appellee, shall be attached to the conveyance by the agents of the appellant. And we cannot doubt that the estoppel, which at common law grew out of the covenants, or the recitals of a sealed instrument, attach now to an unsealed conveyance of the legal estate in lands. The statute is not so broad in its sweep as to blot out the common-law principles which give security to conveyances of real estate. It would be fearful, indeed, if this was the operation of the statute, and the freehold in lands was not invested with greater dignity than the fleeting ownership of chattels. While the clause of the statute we are considering is indicative of a larger legislative intention, than the merely dispensing with a seal as an element of a conveyance of the legal estate in lands, the whole scope of that intention is, that the intention of the grantor, as it is collected from the instrument, shall be carried into effect. The code in many of its sections, parts, and clauses, simply repeats and affirms the common law, and in this clause it is merely declaratory of the rule of universal application in the construction of written instruments, to which we have referred, that the intention of the parties shall be ascertained and effect given to it, if possible. To avoid any supposition or construction that this rule was infringed by dispensing with a seal, as an essential ingredient of the conveyance of the legal estate in lands, is the whole scope of this clause.”¹

§ 249 a. Such statutes not retroactive.—Such statutes however have no retroactive operation and do not affect conveyances executed prior to the adoption of the statute. If at the time at which the deed is executed a seal is required, a statute subsequently enacted abolishing all distinction between sealed and unsealed instruments will not have the effect to render the deed valid.² Nor

¹ Jones v. Morris, 61 Ala. 518, 522, per Brickell, C. J.

² Gibbs v. McGuire, 70 Miss. 646; 12 So. Rep. 829.

will the fact that the deed was executed in another State where a seal is not essential to the validity of a deed alter the rule. In all such cases the *lex rei situs* governs.¹ These remarks, of course, do not apply to curative statutes purposely intended to remedy defective conveyances.

§ 250. **Use of scrolls.**—In many of the States a scroll annexed to the signature of the grantor gives effect to the instrument as one under seal.² Where the necessity for a seal still exists, but the statute permits a scroll to be used for that purpose, the seal cannot be dispensed with by mere words, and the phrase “witness my hand and seal,” will not, in the absence of a seal or scroll, make the instrument a sealed one.³

§ 251. **Delaware, Indiana, Iowa, Louisiana, Missouri, and Virginia.**—In Delaware, Indiana, Iowa, Louisiana, Missouri, and Virginia, it is held that an instrument which contains no expression that it is sealed is not a sealed instrument, though it have a scroll annexed, and the word “seal” written in it.⁴

¹ Gibbs v. McGuire, 70 Miss. 646; 12 So. Rep. 829.

² United States v. Stephenson, 1 McLean, 462; Relph v. Gist, 4 McCord, 267; Lindsay v. State, 15 Ala. 43; Jeffrey v. Underwood, 1 Ark. 108; Cummins v. Woodruff, 5 Ark. 116; Comerford v. Cobb, 2 Fla. 418; Hastings v. Vaughan, 5 Cal. 315; Bradfield v. McCormick, 3 Blackf. 161; Vanblancum v. Yeo, 2 Blackf. 322; Smith v. Baker, 1 Ga. Dec. pt. 1, 126; Scruggs v. Brackin, 4 Yerg. 528; Bohannon v. Hough, 1 Miss. (1 Walk. Ch.) 461; Parks v. Hewlett, 9 Leigh, 511; Carter v. Penn, 4 Ala. 140; Trasher v. Everhart, 3 Gill & J. 234; Wanzer v. Barker, 4 How. (Miss.) 363; McRaven v. McGuire, 17 Miss. (9 Smedes & M.) 34; Commercial Bank v. Ullman, 18 Miss. (10 Smedes & M.) 411; McRain v. Miller, 1 McMull. 313; Parkes v. Duke, 2 McCord, 380; Bertrand v. Burd, 4 Ark. 195; Flemming v. Powell, 2 Tex. 225; Jones v. Logwood, 1 Wash. (Va.) 42; Long v. Ramsey, 1 Serg. & R. 72; Stahter v. Cowman, 7 Gill & J. 284.

³ Williams v. Young, 3 Ala. 145; Moore v. Lespeur, 18 Ala. 606; Vance v. Funk, 3 Ill. 263.

⁴ Armstrong v. Pearce, 5 Har. (Del.) 351; Deming v. Billit, 1 Blackf. 241; Long v. Long, 1 Morris, 343; Bell v. Keefe, 13 La. An. 524; Boynton v. Reynolds, 3 Mo. 79; Walker v. Keile, 8 Mo. 301; Jenkins v. Hunt, 2 Rand. 446. See Moore v. Lesseur, 18 Ala. 606.

§ 252. *Mississippi*.—But it is held otherwise in Mississippi, and a scroll is considered as a seal whenever it appears from the body of the instrument, the scroll itself, or the place where it is affixed, that it was intended as a seal.¹

§ 253. *Tennessee*.—In Tennessee, the word “seal,” affixed to an instrument purporting to be a deed, it has been decided, is as much indicative of an intention to execute a sealed instrument as a seal or scroll would be, and the instrument is therefore a deed. “The word ‘seal’ at the end of the name is equivalent to a seal. The only reason for a scroll made by a flourish of the pen at the place for a seal is to show that it was the intention of the party to execute a deed. Since wax, by which an actual seal was made, has gone out of use, the courts of nearly all the States have regarded the scroll as a substitute for the seal; but the word ‘seal’ written at the place for the seal is certainly much more expressive of the intention of the party to make a deed than a scroll could be and this word so written, should therefore be regarded as a substitute for the seal.”² And in Missouri, the word “seal” at the end of the name of the grantor, and referred to and adopted in the *testimonium* clause, is a sufficient sealing.³ Under the Wisconsin statute, the printed letters “L. S.” inclosed in brackets in the usual place of the seal, is a sufficient device to answer the purposes of a seal, and a

¹ *Hudson v. Poindexter*, 42 Miss. 304. Shackelford, C. J., said: “This court has repeatedly held, in construing the statute, that any instrument to which the person making the same shall affix a scroll by way of seal, shall be adjudged and holden to be of the same force and obligation as if it were actually sealed; that whenever it is manifest that a scroll was intended to be used ‘by way of seal,’ it must have that effect, whether it so appears from the body of the instrument or from the scroll itself; and that ‘any affixture to obligor’s name is an instrument, and in the *locus sigillo*, manifestly intended to be used by way of seal, is sufficient to have that effect;’” *McRaven v. McGuire*, 9 Smedes & M. 34; *Whittington et al. v. Clarke*, 8 Smedes & M. 480; *Commercial Bank of Manchester v. Ullman*, 10 Smedes & M. 411.

² *Whiteley v. Davis’ Lessee*, 1 Swan, 533, per Green, J.

³ *Groner v. Smith*, 49 Mo. 318; *Underwood v. Dollins*, 47 Mo. 259.

party will be held to have adopted these characters as a seal, if he prefixes his signature to them.¹

§ 254. Several persons may bind themselves by one seal.—Several persons may bind themselves by one seal where nothing appears upon the face of the instrument indicating that this was not their intention.² It is not necessary that a separate seal shall be affixed to each name, where a deed purports to be executed under the hands and seals of all the parties signing, and is acknowledged by all. It is a sufficient sealing if it appears that the adoption of the seal attached was intended by each signer.³ “Where the deed is executed for several parties, it does not appear to be necessary to affix a separate and distinct seal for each, if it appears that the seal was intended to be adopted as the seal of each of the parties.”⁴

¹ *Williams v. Starr*, 5 Wis. 534, 549. The scroll need not be made in any particular form where the body of the instrument expresses the execution of a sealed instrument: *Lee v. Adkins, Minor*, 187; *Boynton v. Reynolds*, 3 Mo. 79; *Grimsley v. Riley*, 5 Mo. 280; 32 Am. Dec. 319; *Glasscock v. Glasscock*, 8 Mo. 577. Where the law requires instruments to be recorded, and declares that prior to recording they must be sealed, the fact that the record fails to show that a seal was attached to the instrument does not overcome the presumption raised by the law that the instrument was sealed, or the officer would have refused to record it: *Starkweather v. Martin*, 28 Mich. 471. An instrument must be sealed according to the method recognized in the state where it is executed, or where the land is situated, else it is not a deed: *Jones v. Crawford*, 1 McMull. 373; *Arms v. Burt*, 1 Vt. 306; 18 Am. Dec. 680; *Pratt v. Clemens*, 4 W. Va. 443; *Taylor v. Morton*, 5 Dana, 365; *Davis v. Brandon*, 1 How. (Miss.) 154; *Kelleran v. Brown*, 4 Mass. 443. See *Shortridge v. Catlett*, 1 Marsh. A. K. 587; *Harley v. Ramsey*, 49 Mo. 309.

² *Mapes v. Newman*, 2 Ark. 469; *Burnett v. McCluey*, 78 Mo. 676; *Yale v. Flanders*, 4 Wis. 96; *Carter v. Chaudron*, 21 Ala. 72; *Mackay v. Bloodgood*, 9 Johns, 285; *Williams v. Greer*, 12 Ga. 459; *State Bank v. Bailey*, 4 Ark. 453; *Flood v. Yandes*, 1 Blackf. 102; *Bohannons v. Lewis*, 3 T. B. Mon. 376; *Bank of Cumberland v. Bugbee*, 19 Me. 27; *Pickens v. Rymer*, 90 N. C. 282; 47 Am. Rep. 521; *Norvill v. Walker*, 9 W. Va. 447; *Tasker v. Bartlett*, 5 Cush. 359; *Bowmann v. Robb*, 6 Pa. St. 302; *Lambden v. Sharp*, 9 Humph. 224.

³ *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Van Alstyne v. Van Slyck*, 10 Barb. 383; *Yarborough v. Monday*, 2 Dev. 493; *McLean v. Wilson*, 4 Ill. 50.

⁴ *Chancellor Walworth*, in *Townsend v. Hubbard*, 4 Hill, 351, 358. See *Tasker v. Bartlett*, 5 Cush. 359.

CHAPTER XI.

ATTESTING WITNESSES.

- § 255. Attesting witnesses not necessary at common law.
- § 256. Witnesses required in different States.
- § 257. Attestation must be made at grantor's request.
- § 258. Import of term.
- § 259. Qualification of the witnesses.

§ 255. Attesting witnesses not necessary at common law.—At common law it was not necessary that the execution of a deed should be attested by subscribing witnesses. Blackstone, speaking of the necessity for the attestation of deeds, says: "This is necessary, rather for preserving the evidence than for constituting the essence of the deed."¹ "The rule seems to be well settled by authority, that an attesting witness is not necessary to a deed. A deed is a writing, signed, sealed, and delivered."² "Subscribing witnesses are not necessary to the validity of a deed, and if none, or called and they deny having seen the execution, or a fictitious name is put to it, as a witness by the obligor, or the attesting witness at the time of the execution was interested in it, and continues so at the time of the trial, proof of the contractor's handwriting is sufficient if the instrument on the face of it purports to be sealed and delivered."³

§ 256. Witnesses required in different States.—In Connecticut, Delaware, Georgia, Kentucky, Michigan,

¹ 2 Blackst. Com. 307.

² *Dole v. Thurlow*, 12 Met. 157, 166.

³ 3 Dane's Abr. 354; *Thacher v. Phinney*, 7 Allen, 149; *Craig v. Pinson*, Cheves, 273; 1 Wood on Conveyancing, 239; Com. Dig. Tait, B, 4; *Meuley v. Zeigler*, 23 Tex. 88. See *Dobbin v. Cordiner*, 41 Minn. 165; 16 Am. St. Rep. 683; *Hadden v. Larned*, 87 Ga. 634; *Jones v. Hagler*, 95 Ala. 529; *Eureka Lumber Co. v. Brown*, 103 Ala. 140; 15 So. Rep. 518.

Minnesota, New Hampshire, South Carolina, Tennessee, Rhode Island, and Vermont, two attesting witnesses are required to the execution of the deed.¹ One witness is sufficient in Maryland and Mississippi.² A deed without witnesses has been held good between the parties in New Hampshire and Kentucky.³ In Alabama, where the grantee writes his name, the deed must be attested by one witness, and if he cannot write, two witnesses are required.⁴ In Michigan, it was held under the early statute requiring two witnesses that a deed was invalid unless so attested;⁵ but in that State, in a late case, it was decided that the title might pass without witnesses or acknowledgment, but cannot be fully protected, and therefore the court held that where general terms are employed, such as "property and effects of every description," and it is doubtful whether the conveyance covered land, the fact that the instrument was not witnessed or acknowledged is entitled to weight in determining the probable intent of the grantor.⁶

§ 257. Attestation must be made at the grantor's request.—The usual clause to denote that the witnesses

¹ Connecticut, Gen. Stats., p. 352, § 5; Delaware, Rev. Code, ch. 83, § 3; Georgia, Code, § 2690; Kentucky, Gen. Stats. 1879, p. 257, § 15; Michigan, Comp. Laws, p. 1347, § 8; Minnesota, Stats., vol. 1, p. 637, § 7 (1871); New Hampshire, Gen. Stats., p. 251, § 3; South Carolina, Rev. Stats., p. 473, § 4; Rhode Island, *Kenyon v. Segar*, 14 R. I. 490; Vermont, Gen. Stats., p. 450, § 18.

² Rev. Code Maryland, 1878, p. 383, § 3; *Shirley v. Fearne*, 33 Miss. 653; 69 Am. Dec. 375.

³ *Kingsley v. Holbrook*, 45 N. H. 320; 86 Am. Dec. 173; *Fitzhugh v. Croghan*, 2 Marsh. J. J. 429; 19 Am. Dec. 139.

⁴ Code Ala., §§ 2145, 2146; *Lord v. Folmar*, 57 Ala. 615; *Goodlett v. Hansell*, 57 Ala. 346; *Bank of Kentucky v. Jones*, 59 Ala. 123. An acknowledgment is a substitute for the attestation of subscribing witnesses: *Sharp v. Orme*, 61 Ala. 263. There, however, must be one or the other: *Goodlett v. Hansell*, 56 Ala. 346.

⁵ *Crane v. Reeder*, 21 Mich. 24; 4 Am. Rep. 430.

⁶ *Price v. Haynes*, 37 Mich. 487. A deed having but one witness was permitted, in Vermont, to be used in evidence to compel specific performance: *Day v. Adams*, 42 Vt. 510; *Vermont Mining Co. v. Windham Bank*, 44 Vt. 489. In New York, unless acknowledged, a deed should be attested by at least one witness: *Genter v. Morrison*, 31 Barb. 155.

sign as such is "signed, sealed, and delivered in the presence of," the witnesses writing their names thereunder. If the grantor request the witnesses to sign their names to the attestation clause, and they do so, the deed is properly attested, even if the witnesses did not see the grantor write his name. "A deed takes effect from the delivery, and if the parties choose to sign their names alone, and then call witnesses, before whom they acknowledge the instrument, that is a good execution."¹

§ 258. Import of term.—The term "subscribing witness" imports that the person who claims to be such must either have seen the maker sign, or heard him acknowledge his signature, and he must himself sign as witness in the maker's presence, at his request or by his assent; if he does not sign in the presence of the maker, he must have received a special request from the maker to attest the instrument. Therefore, where a deed was executed by the grantor and delivered to the grantee, who for several years failed to register it, and although the deed was signed in the presence of two sons of the grantee, the latter were not requested to witness it, nor did they sign as witnesses, but after the death of the grantee, the two sons took the deed to the clerk's office, and there attaching their names as witnesses, proved its execution and had it registered, it was held that the registration was void, and that the land described in the deed was still subject to attachment by the creditors of the grantor.²

¹ *Jackson v. Phillips*, 9 Cowen, 94, 113; *Parke v. Mears*, 2 B. & P. 217. See *Kenyon v. Segar*, 14 R. I. 490.

² *Tate v. Lawrence*, 11 Heisk. 503. Mr. Justice Sneed, delivering the opinion of the court, said: "Mr. Simon Greenleaf defines a 'subscribing witness' to be one who was present when the instrument was executed, and who at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself but by the party, it is no attestation. Nor is it such if, though present at the execution, he did it afterward and without request, or by the fraudulent procurement of the other party. But it is not necessary that he should actually have seen the party sign, nor have been present at the very moment of signing; for if he is called in

§ 259. **Qualification of the witnesses.**—The object of requiring subscribing witnesses is to enable the other party to inquire into the circumstances attending the sealing and delivery.¹ For this reason they should be persons competent to testify to the facts in an action between the parties or to testify generally. Hence a wife, whether of the grantor or grantee, is incompetent.² And so a grantor in a joint deed is incompetent to be a witness of the execution of the deed by his co-grantors.³ In Connecticut, the decisions are to the effect that the competency of the witnesses must exist at the time of the execution of the deed.⁴ In New Hampshire, on the other

immediately afterward, and the party acknowledges the signature to the witness and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation: 1 Greenl. Ev. § 569. The principle of the rule, says Mr. Greenleaf, is that the party to whose execution he is a witness, is considered as invoking him, as the person to whom he refers to prove what passed at the time of the attestation, and that he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction, as facts may be known to him which have passed out of the recollection of the bargainer himself: 1 Greenl. Ev. § 569. The objects of our registration laws were to preserve the muniments of title, to perpetuate the evidence of their valid execution, to give the community notice of the changes in the ownership of property: *Yerger v. Young*, 9 Yerg. 37; *Saunders v. Harris*, 5 Humph. 345; 4 King's Dig. § 10336. And it may be added to prevent frauds both upon the bargainer and upon his creditors. Thus, a deed may be executed and delivered upon conditions or in escrow, and the policy of requiring subscribing witnesses is obvious. . . . While we do not hold that under our statute it is necessary that the witness should see the party write his name, yet he must have heard the bargainer acknowledge the instrument, and he must subscribe it as a witness either in his presence, or, if in his absence, at his special request: 3 Wash. Real Prop. 248; *Jackson v. Phillips*, 9 Cowen, 113. It is unquestionably a wise policy which forbids the registration of a deed, except upon the acknowledgment of the bargainer, or upon the testimony of 'subscribing witnesses'; and we are constrained to hold that a subscribing witness, in the sense of our registry laws, is one who becomes a witness at the request of the bargainer, either in his presence or at his special request or with his assent, upon his acknowledgment of the execution of the deed."

¹ *Morkley v. Swartzlander*, 8 Watts & S. 172.

² *Corbett v. Norcross*, 35 N. H. 99; *Smith v. Chapman*, 4 Conn. 344; *Carter v. Champion*, 8 Conn. 549; 21 Am. Dec. 695.

³ *Townsend v. Downer*, 27 Vt. 119.

⁴ *Winsted Savings Bank v. Spencer*, 26 Conn. 195.

hand, it is sufficient if one of them is competent to testify at the time the attestation is to be proved.¹ In those States where interest is a disqualification, an interested party cannot be a subscribing witness. Where this is the case, the stockholder of a private pecuniary corporation is disqualified from acting as an attesting witness to the execution of a deed made to the corporation.² But if the witness had no interest at the time, the fact that he subsequently acquired an interest does not affect the validity of the deed.³

¹ *Frink v. Pond*, 46 N. H. 125.

² *Winsted Savings Bank v. Spencer*, 26 Conn. 195. It was also held in this case that a party who has executed a deed attested in this manner, is not estopped from denying that a legal title was conveyed by such a conveyance to the grantee.

³ *Carter v. Corley*, 23 Ala. 612. Say the court: "Although the suit is brought for the use of Wm. Townes, who is one of the attesting witnesses to the deed which Corley and his wife signed, it does not appear that he had any interest at the time he attested the deed; and if not, an interest subsequently acquired in the note given for the purchase money could not affect the validity of his previous attestation. The grantee in the deed had an interest in that act, and in his testimony to it, if required afterwards, which he had no power to destroy even if he desired to do so: 3 Phillips on Evidence, 1266, *et seq.*" In Alabama, it is necessary that attesting witnesses should be able to write their own names: *Harrison v. Simons*, 55 Ala. 510. A witness is intended merely to attest the execution of the deed. He is not allowed like a subscribing witness to a will to express an opinion as to the capacity of the grantor to act: *Dean v. Fuller*, 40 Pa. St. 474.

CHAPTER XII.

DELIVERY OF DEEDS.

- § 260. Delivery essential.
- § 261. No particular form required.
- § 262. Delivery a question of intention.
- § 263. Evidence of intention.
- § 264. When deed takes effect.
- § 265. Presumption as to time of delivery.
- § 266. Verbal admissions.
- § 267. Possession of deed surreptitiously obtained.
- § 268. Ratification of deed so obtained.
- § 268 a. Manner of ratification.
- § 269. Manual delivery not requisite.
- § 270. Delivery of commissioner's deed.
- § 271. Delivery for inspection.
- § 272. Delivery to director of corporation.
- § 273. Deed delivered for examination, whether a contract of purchase.
- § 273 a. Canceling instructions for delivery.
- § 273 b. Offer to comply with terms of delivery.
- § 273 c. Undelivered deed in connection with other evidence.
- § 274. Delivery to officer taking acknowledgment.
- § 275. Delivery to another for the grantee's use.
- § 275 a. Death of grantor before actual delivery to grantee.
- § 276. Assent of grantee subsequent to delivery.
- § 277. Where there are several grantors.
- § 278. Constructive delivery.
- § 279. Delivery after death of grantor.
- § 279 a. Some illustrations.
- § 280. Absolute delivery to a third person to hold until grantor's death.
- § 281. Instances.
- § 281 a. Grantor's acts and declarations after delivery.
- § 282. Delivery with a right to recall the deed.
- § 283. This rule not universally adopted.
- § 283 a. Creditors not injured by undelivered deed.
- § 284. Saving expenses of administration.
- § 284 a. Formal expression of grantor.
- § 285. Acceptance by the grantee.
- § 286. Presumption of acceptance in favor of infants.
- § 287. Presumption of acceptance by adults.
- § 288. Contrary views.
- § 289. What is the proper rule—Comments.
- § 290. Registration not of itself delivery.
- § 291. Delivery to recording officer for use of grantee.
- § 292. Registration *prima facie* evidence of delivery.
- § 293. Where acceptance of deed depends upon conditions, registration is not *prima facie* evidence of delivery.

- § 293 a. Deed executed in payment of a debt.
- § 294. Possession of deed by grantee, presumption of delivery.
- § 295. Parol evidence admissible to rebut presumption arising from possession of deed.
- § 296. Inference of delivery of deed from execution in presence of witnesses.
- § 297. Inference of acceptance from relationship between person receiving deed and grantee.
- § 297 a. Estoppel of grantor.
- § 298. Delivery to several grantees.
- § 299. Comments.
- § 300. Deed once executed and delivered cannot be revoked.
- § 301. Illustrations of foregoing rule.
- § 301 a. Trustee of resulting trust.
- § 301 b. Erasure of grantor's name.
- § 302. A different doctrine prevails in some of the States.
- § 303. Ground upon which these decisions are based.
- § 304. Redelivery without intention to revest title.
- § 305. Comments on these decisions.
- § 306. Redelivery to the grantor for correction, acknowledgment, etc.
- § 307. Delivery to a married woman.
- § 308. Whether delivery is a question of law or fact.
- § 309. Deed taking effect as a will.
- § 309 a. Intention of maker in determining whether a deed or a will.
- § 310. Complete execution before delivery essential.
- § 311. Right to rents.

§ 260. Delivery essential.—To operate as an effectual transfer of title to land, it is necessary that the deed should be delivered.¹ “The delivery of a deed is essen-

¹ *Oliver v. Stone*, 24 Ga. 63; *Fairbanks v. Metcalf*, 8 Mass. 230; *Black v. Thornton*, 31 Mass. 641; *Herbert v. Herbert*, 1 Breese, 354; 12 Am. Dec. 192; *Ferguson v. Miles*, 9 Ill. (3 Gilm.) 358; 54 Am. Dec. 702; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Jackson v. Richards*, 6 Cowen, 617; *Porter v. Buckingham*, 2 Har. (Del.) 197; *Jackson v. Leet*, 12 Wend. 105; *Fay v. Richardson*, 7 Pick. 91; *Clark v. Ray*, 1 Har. & J. 318; *Frisbie v. McCarty*, 1 Stewt. & P. 56; *Carr v. Hixie*, 5 Mass. 60; *Stiles v. Brown*, 16 Vt. 563; *Alexander v. Bland*, Cooke, 431; *Jackson v. Phipps*, 12 Johns. 418; *Hughes v. Easten*, 4 Marsh. J. J. 572; 20 Am. Dec. 230; *Barr v. Schroeder*, 32 Cal. 610; *Fitch v. Bunch*, 30 Cal. 208; *Wood v. Ingraham*, 3 Strob. Eq. 105; 51 Am. Dec. 671; *Van Arminge v. Morton*, 4 Whart. 382; 34 Am. Dec. 517; *Bank of Healdsburg v. Bailhace*, 65 Cal. 327; *Fitzgerald v. Goff*, 99 Ind. 28; *Lang v. Smith*, 37 W. Va. 725; *Hutton v. Smith*, 88 Iowa, 238; *Cazassa v. Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112; *Chick v. Sisson*, 95 Mich. 412; *Farmers' & Traders' Bank v. Haney*, 87 Iowa, 101; *Toms v. Owens*, 52 Fed. Rep. 417. For various late cases decided, upon what facts constitute a delivery, see *Douglass v. West*, 140 Ill. 455; *Lang v. Smith*, 37 W. Va. 725; *Corker v. Corker*, 95 Cal. 308; *Richmond v. Morford*, 4 Wash. St. 337; *Pitts v. Sheriff*, 108 Mo.

tial to the transfer of the title. It is the final act, without which all other formalities are ineffectual.”¹ As was forcibly said by Mr. Justice Marston: “One of the essential requisites of the validity of a deed, so as to pass the title, is delivery. Even although in all other respects it has been properly executed, yet it does not follow that the title to the property passes; the grantor yet retains control of the instrument, and may deliver it absolutely, conditionally, or not at all. The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words, or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person, for his use and benefit. The whole object of a delivery is to indicate an intent upon the part of the grantor to give effect to the instrument.”²

110; *Dimmick v. Dimmick*, 95 Cal. 323; *Lancaster v. Blaney*, 140 Ill. 203; *McDonald v. Minnick*, 147 Ill. 651; *Burk v. Sproat*, 96 Mich. 404; *Haeg v. Haeg*, 53 Minn. 33; *Barrows v. Barrows*, 138 Ill. 649; *Hall v. Hall*, 107 Mo. 101; *Vought's Executors v. Vought*, 50 N. J. Eq. 177; *Parrott v. Avery*, 159 Mass. 594; 38 Am. St. Rep. 465; *Richardson v. Gray*, 85 Iowa, 149; *Chick v. Sisson*, 95 Mich. 412; *Gould v. Wise*, 97 Cal. 532; *Haenni v. Bleisch*, 146 Ill. 262; *Hunt v. Swayze*, 55 N. J. L. 33; *Cazassa v. Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112; *Ward v. Small's Admr.*, 90 Ky. 198; *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Davis v. Garrett*, 91 Tenn. 147; *Williams v. Latham*, 113 Mo. 165; *Provart v. Harriss*, 150 Ill. 40; *Reichert v. Wilhelm*, 83 Iowa, 510; *Lyon v. Lyon*, 76 Mich. 610.

¹ *Younge v. Guilbeau*, 3 Wall. 636, 641, per Mr. Justice Field. See *Jones v. Loveless*, 99 Ind. 317.

² *Thatcher v. St. Andrew's Church*, 37 Mich. 264, 268. In *Cannon v. Cannon*, 26 N. J. Eq. (11 Green, C. E.) 316, the court say, on page 319: “To make a delivery of a deed, it is not necessary it should actually be handed over to the grantee, or to another person for him. It may be effected by words without acts, or by acts without words, or by both acts and words. Indeed, it may be made, though the deed remains in the custody of the grantor. Thus, if both parties are present when the usual formalities of execution take place, and the contract is fully carried out, and nothing remains to be done except the empty ceremony of passing the deed from the grantor to the grantee, the law regarding the substance, and disregarding mere form, will adjudge the title has passed to the grantee, and that the deed is good and valid to him though it should remain in the custody of the grantor. However, in cases where there is

§ 261. **No particular form required.**—It is not necessary to pursue any particular course to effect a valid delivery of a deed. It is sufficient that a grantor intends when executing a deed, to be understood as delivering it. Hence, a grantor is not permitted to say that a deed is inoperative for want of a formal delivery, where he has induced the grantee to believe in its execution, and afterward allows the grantee to act under this belief, in the construction of valuable improvements upon the land conveyed.¹ And it has been held that the signing, seal-

not an actual transfer of the deed, it must satisfactorily appear, either from the circumstances of the transaction, or the acts or words of the grantor, that it was his intention to part with the deed and put the title in the grantee: *Crawford v. Bertholt*, Saxt. Ch. 467; *Folly v. Vantuyd*, 4 Halst. 158; *Farlee v. Farlee*, 1 Zab. 285; *Garnons v. Knight*, 5 Barn. & C. 687; 4 Kent's Com. 505." See, also, *Armstrong v. Stovall*, 26 Miss. 275; *Jackson v. Sheldon*, 22 Me. 569; *Whittaker v. Miller*, 83 Ill. 381; *Wood on Conveyancing*, 193; 3 Wash. Real Prop. 286. If a grantor requests that the execution of a deed shall be kept secret so as to avoid the importunity of other heirs, this gives him no right to demand a return of the deed, and does not postpone its operation until his death, or transform it into a will: *Crain v. Wright*, 114 N. Y. 307.

¹ *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445. In this case, Mr. Justice Lawrence, in delivering the opinion of the court, said: "Whether the statement of Presley to his son, on the day the deed was made, that it was at his house ready for him, would of itself be considered as equivalent to a delivery, it is not necessary to decide, though, as was said by this court in *Bryan v. Wash.* 2 Gilm. 565, a 'delivery may be by acts without words, or by words without acts, or by both.' The case does not depend upon these words alone, but upon them taken in connection with and construed by the subsequent acts of the parties. And tried by this test, we can entertain no doubt that the son understood these words of his father as meaning a deed had been executed with all the formalities requisite to vest the title, and making him the owner of the land; and that under the belief in such ownership, he built his house, and occupied it till his last sickness, when he was taken to his father's house to die. His father permitted him to entertain this belief, and to act under it, expending time, labor, and money, and probably entertained the same belief himself. There is no evidence whatever that it was ever brought to the knowledge of Alonzo that his mother had interposed any objections, or that she desired to require a promise from him that he would remain on the place, before she would consent to the delivery. All these circumstances form a strong case of equitable estoppel. Having induced Alonzo to believe that a deed had been executed which made him the owner, and having permitted him to act under this belief in the manner above stated, he cannot now be allowed to say that the

ing, and attestation of a deed as a valid instrument between the parties will render it complete and effectual, notwithstanding it may be left in the possession of the grantor where no condition is attached, and nothing remains to be done to give the deed effect. Like any other fact, proof of which is required, the delivery of a deed may be established by circumstantial evidence.¹ But while it is conceded that no formal manual delivery to the grantee is required, yet there should be some evidence that the deed was delivered, or in case the grantor retains possession until his death, that he intended his signature and acknowledgment before witnesses should vest the title, and evidence of the withholding of the deed by the grantor from the grantee until a particular event casts the burden of proving a delivery upon the latter.² "It is

deed was in fact inoperative for want of a formal delivery. No formal delivery to the grantee in person was necessary. If the grantor in a deed intends, when executing it, to be understood as delivering it, that is sufficient. The intention of the party is the controlling element, as said in *Masterton v. Cheek*, 23 Ill. 76, and in this case there can be no doubt that both the father and the son, judged in the light of their subsequent conduct, considered the deed as having been effectually executed for the purpose of passing the title. Less strictness is required in cases of voluntary settlements, and for a reason well illustrated in this case, to wit, because the parties are supposed to place great confidence in each other: *Bryan v. Wash*, 2 Gilm. 568, and cases there cited. In this case, the son, no doubt, had all confidence in his father, and considered the deed as safe in his house as if in his own." In that case, after the deed was executed, the mother made some objection, when her husband told her to take the deed and keep it, until she should be satisfied that the son would remain on the place and not sell it. After the father and the magistrate left the former's house, where the deed had been executed, they met the son, and the father said to him: "Pay the squire for making your deed. It is up at the house ready for you."

¹ *McLaughlin v. Manigle*, 63 Tex. 553; *Farrar v. Bridges*, 24 Tenn. (5 Humph.) 411; 42 Am. Dec. 439. See *Taylor v. Taylor*, 2 Humph. 597; *Soverbye v. Arden*, 1 Johns. Ch. 240.

² *Martin v. Ramsey*, 5 Humph. (24 Tenn.) 350. A husband who has the entire charge of his wife's estate may hold a deed executed by him to her as her agent: *Vought's Executors v. Vought*, 50 N. J. Eq. 177. A deed was held not to have been delivered where the evidence of delivery was as follows: The deed was signed, acknowledged, and witnessed, handed to a son and by him immediately handed back to his father. A witness testified that the father said that "he calculated to deed that property to Charles; that his son Gus had his share, so that there would be no trouble after he

elementary law," says Mr. Justice Virgin, "that the delivery of a deed is as indispensable as the seal or signature of the grantor. Without this act on the part of the grantor, by which he makes known his final determination to consummate the conveyance, all the preceding formalities are impotent to impart vitality to it as a solemn instrument of title. No formulary of words or acts is prescribed as essential to render an instrument the deed of a person sealing it. It may be done by acts or words, or by both, by the grantor himself, or by another by the grantor's authority, precedent or assent subsequent with the intention thereby to give effect as his deed; to the grantee personally, to another authorized by the grantee to accept it, or to a stranger with a subsequent ratification, although it do not reach the grantee until after the death of the grantor."¹ A statement by the

was dead; that the father said he would not like to see the deed go on record until after he was dead; and that Charles said that he need not be afraid, the deed should not go on record, and that he could keep it himself." The father retained the deed as well as possession of the property and subsequently executed other deeds for the same property: *Schuffert v. Grote*, 88 Mich. 650; 26 Am. St. Rep. 316.

¹ In *Brown v. Brown*, 66 Me. 316, 320; *Burkholder v. Casad*, 47 Ind. 418; *McClure v. Colclough*, 17 Ala. 89; *Dayton v. Newman*, 19 Pa. St. 194; *Porter v. Cole*, 4 Me. 20, 25; *Devinal v. Holmes*, 22 Me. 121; *Hatch v. Bates*, 54 Me. 136; *Chadwick v. Webber*, 3 Greenl. 141; 14 Am. Dec. 222; *Verplanck v. Sterry*, 12 Johns. 536; 7 Am. Dec. 348; *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35; *Gilmore v. Whitesides*, Dud. Eq. 14; 31 Am. Dec. 563; *Blight v. Schenck*, 12 Barr. 285; 10 Pa. St. 285; 51 Am. Dec. 478; *Doe v. Knight*, 5 Barn. & C. 671; *Woodman v. Coolbroth*, 7 Me. 181; *Turner v. Whidden*, 22 Me. 121; *Shep. Touch.* 57, 58; *Chess v. Chess*, 1 Penr. & Watts, 32; 21 Am. Dec. 350; *Hughes v. Easten*, 4 Marsh. J. J. 572; 20 Am. Dec. 230. In *Warren v. Sweet*, 31 N. H. (11 Fost.) 332, *Eastman, J.*, says (p. 340): "No form of words is necessary in the delivery of a deed. It is complete when the grantor has parted with his dominion over it, with intent that it shall pass to the grantee, provided the grantee assents to it, either by himself or his agent." Where a deed was executed by the grantor in the house of the grantee and left upon the table of the latter, who picked it up and placed it away, the delivery was sufficient: *McLennan v. McDonnell*, 78 Cal. 273. But where the grantee, during negotiations of a sale of an interest in a business, obtains possession of a deed which was lying upon a table, and its return is demanded and refused, there is no delivery: *Major v. Todd*, 84 Mich. 85.

grantor to the husband of the grantee, that certain deeds were in his drawer, and that he desired such husband to get them and have them recorded, and telling him to enter upon and improve the portion conveyed to his wife, cannot be said to be sufficient evidence to show a delivery.¹ The grantor must part with all control and dominion over the deed to make a valid delivery.²

§ 262. **Delivery a question of intention.**—As no particular form of delivery is required, the question whether there was a delivery of a deed or not so as to pass title must in a great measure, where it is not clear that an actual delivery has been effected, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed.³ “The doctrine seems to be settled beyond reason-

¹ *O’Neal v. Brown*, 67 Ga. 707. And see as to evidence tending to show the delivery of a deed, *Martz v. Eggeman*, 44 Mich. 430. A person executed to a town a deed of a lot of land on condition that a library building should be erected upon it. There was evidence that the deed after being signed was left with the grantor, and that about a month afterward it was acknowledged by him, and recorded twelve days after the acknowledgment. It was also shown that the town voted to erect a building on the land, and had appointed a building committee who soon after began, and had since completed, the building. On the issue of delivery and acceptance, it was held that the evidence was sufficient to warrant the finding that the deed had been delivered and accepted. Evidence was also introduced showing that the deed after the death of the grantor was found in his house, and that the selectmen had no knowledge of any delivery. But this was held not conclusive in law to overcome the other showing: *Snow v. Orleans*, 126 Mass. 453. See, also, as to what constitutes delivery, *Jones v. Loveless*, 99 Ind. 327; *Davis v. Cross*, 14 Lea (Tenn.), 637; 52 Am. Rep. 177; *Miller v. Lullman*, 81 Mo. 311.

² *Schuffert v. Grote*, 88 Mich. 650; 26 Am. St. Rep. 316; *Dean v. Parker*, 88 Cal. 283; *Porter v. Woodhouse*, 59 Conn. 268; 21 Am. St. Rep. 131; *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188.

³ *Jordan v. Davis*, 108 Ill. 336; *Revard v. Walker*, 39 Ill. 413; *Warren v. Swett*, 31 N. H. 332; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Byers v. McOlanahan*, 6 Gill & J. 250; *Stewart v. Reddett*, 3 Md. 67; *Crawford v. Bertholf*, 1 N. J. Eq. 458; *Thompson v. Hammond*, 1 Edw. Ch. 497; *Dukes v. Spangler*, 9 Cent. L. J. 398; *Burkholder v. Casad*, 47 Ind. 418;

able doubt," remarks Justice Atwater, "that where a party executes and acknowledges a deed, and afterward, either by acts or words, expresses his will that the same is for the use of the grantee, especially where the assent of the

Hastings *v.* Vaughn, 5 Cal. 315; Tyler *v.* Hall, 106 Mo. 313; 27 Am. St. Rep. 337; Dean *v.* Parker, 88 Cal. 283; Price *v.* Hudson, 125 Ill. 284; Gordon *v.* Adams, 127 Ill. 223; Vreeland *v.* Vreeland, 48 N. J. Eq. 56; Hubbard *v.* Cox, 76 Tex. 239; Stokes *v.* Anderson, 118 Ind. 533; Hurlburt *v.* Wheeler, 40 N. H. 73; Dwinell *v.* Bliss, 58 Vt. 353; Orr *v.* Clark, 62 Vt. 136; Elmore *v.* Marks, 39 Vt. 538; Lindsay *v.* Lindsay, 11 Vt. 621; Shurtleff *v.* Francis, 118 Mass. 154; Parrott *v.* Avery, 159 Mass. 594; 38 Am. St. Rep. 465; Stevens *v.* Stevens, 150 Mass. 557; Brabrook *v.* Bank, 104 Mass. 228; 6 Am. Rep. 222; Chase *v.* Breed, 5 Gray, 440; Hawkes *v.* Pike, 105 Mass. 560; 7 Am. Rep. 554; Somers *v.* Pumphrey, 24 Ind. 231; Hotchkiss *v.* Olmstead, 37 Ind. 74; Dean *v.* Parker, 88 Cal. 283; Ross *v.* Campbell, 73 Ga. 309; Martling *v.* Martling, 47 N. J. Eq. 122; Fain *v.* Smith, 14 Or. 82; 58 Am. Rep. 281; Thatcher *v.* St. Andrews Church, 37 Mich. 264; Douglass *v.* West, 140 Ill. 455; Miller *v.* Meers, 155 Ill. 284; McElroy *v.* Hiner, 133 Ill. 156; Otis *v.* Beckwith, 49 Ill. 121; Weber *v.* Christen, 121 Ill. 91; Benson *v.* Hall, 150 Ill. 60; 2 Am. St. Rep. 68; Walker *v.* Walker, 42 Ill. 311; 89 Am. Dec. 445; Otis *v.* Spencer, 102 Ill. 622; 40 Am. Rep. 617; Gunnell *v.* Cockerill, 79 Ill. 79; Masterson *v.* Cheek, 23 Ill. 72; Benneson *v.* Aiken, 102 Ill. 284; 40 Am. Rep. 592; Hill *v.* Hill, 119 Ill. 242; Byars *v.* Spencer, 101 Ill. 429; 40 Am. Rep. 212; Roane *v.* Baker, 120 Ill. 308; Burnap *v.* Sharpsteen, 149 Ill. 225; McDonald *v.* Minnick, 147 Ill. 651; Lancaster *v.* Blaney, 140 Ill. 203; Shovers *v.* Warrick, 152 Ill. 355; Standiford *v.* Standiford, 97 Mo. 231; Gilmore *v.* Morris, 13 Mo. App. 114; Hammerslough *v.* Cheatham, 84 Mo. 13; Hutton *v.* Smith, 88 Iowa, 238; Richardson *v.* Grays, 85 Iowa, 149; Ware *v.* Smith, 62 Iowa, 159; Craven *v.* Winter, 38 Iowa, 471; Farmers' & Traders' Bank *v.* Haney, 87 Iowa, 101; Steel *v.* Miller, 40 Iowa, 402; Tallman *v.* Cooke, 39 Iowa, 402; Parker *v.* Parker, 56 Iowa, 111; Robinson *v.* Gould, 26 Iowa, 89; McKenna *v.* Kelso, 52 Iowa, 727; Alexander *v.* Alexander, 71 Ala. 295; Martin *v.* Flaharty, 13 Mont. 96; 40 Am. St. Rep. 415; Jones *v.* Swayze, 42 N. J. L. 279; Davis *v.* Williams, 57 Miss. 843; Warren *v.* Swett, 31 N. H. 322; Tisher *v.* Beckwith, 30 Wis. 55; 11 Am. Rep. 546; Tyler *v.* Hall, 106 Mo. 313; 27 Am. St. Rep. 337; Stevens *v.* Hatch, 6 Minn. 64; Gaston *v.* Merriam, 33 Minn. 271; Conlan *v.* Grace, 36 Minn. 276; Schmitt *v.* Schmitt, 31 Minn. 99; Brittain *v.* Work, 13 Neb. 347. In *Bogie v. Bogie*, 35 Wis. 659, the court, after citing many cases, says, per C. J. Ryan (p. 667): "These authorities establish that there is no set ritual of delivery; that when a deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered; and that such meeting of minds may be gathered from acts or signs, words or silence, in multitudinous variety of circumstance." And see *Harris v. Harris*, 59 Cal. 620.

grantee appears to the transaction, it shall be sufficient to convey the estate, although the deed remains in the hands of the grantor. . . . The main thing which the law looks at is whether the grantor indicates his will that the instrument should pass into the possession of the grantee; and if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee."¹ A deed does not become operative until it is delivered with the intent that it shall become effective as a conveyance. Whether such intent actually existed is a question of fact to be determined by the circumstances of the case, and cannot in the majority of instances be declared as a matter of law.² A deed was held complete and valid where it had been prepared for execution, read, signed, and acknowledged before a proper officer, notwithstanding the testimony of the witnesses present at its execution that

¹ *Stevens v. Hatch*, 6 Minn. 64, 76.

² *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726; *Denis v. Velati*, 96 Cal. 223; *Lutes v. Reed*, 138 Pa. St. 171; *Roll v. Red*, 50 N. J. L. 264; *Hunt v. Swayze*, 55 N. J. L. 33; *Nye v. Lowry*, 82 Ind. 316; *Cherry v. Herring*, 83 Ala. 458; *Bovey v. Hinde*, 135 Ill. 137; *Hannah v. Swarner*, 8 Watts, 9; 34 Am. Dec. 442; *Pitts v. Sheriff*, 108 Mo. 110; *Graham v. Meacham*, 63 Vt. 231; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Crowder v. Searcy*, 103 Mo. 97; *Burke v. Adams*, 80 Mo. 504; 50 Am. Rep. 510; *Standiford v. Standiford*, 97 Mo. 231; *Welch v. Sackett*, 12 Wis. 243; *Bogie v. Bogie*, 35 Wis. 659; *Simmons v. Simmons*, 78 Ala. 365; *McLure v. Colclough*, 17 Ala. 89; *Elsberry v. Boykin*, 65 Ala. 336; *Rountree v. Smith*, 152 Ill. 493; *Pennsylvania Co. v. Dovey*, 64 Pa. St. 260; *Van Hook v. Walton*, 28 Tex. 59; *Dayton v. Newman*, 19 Pa. St. 194; *Whitman v. Heneberry*, 73 Ill. 109; *Alexander v. Alexander*, 71 Ala. 295; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Vaughan v. Gorman*, 94 Ind. 11; *Lindsay v. Lindsay*, 11 Vt. 621; *Hill v. McNichol*, 80 Me. 209; *Earle v. Earle*, 20 N. J. L. 347; *Hatch v. Hatch*, 54 Me. 136; *Brown v. Brown*, 66 Me. 316; *Flint v. Phipps*, 16 Or. 437; *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281; *Critchfield v. Critchfield*, 24 Pa. St. 100; *Devereux v. McMahon*, 103 N. C. 134. "In all cases the intention of the grantor to part with its possession and control enters largely into the question of delivery. When the facts show that the grantor did not intend to lose control of the deed, and still continues to have power over the title without the consent of the grantee, there is not such a delivery as the law requires to render it a deed, and it cannot pass title": *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212. See, also, to the same effect, *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188.

there was no formal delivery, and the fact that the deed after the grantor's death was found among his private papers in his desk.¹ For the more convenient operation of a winery plant a corporation was used by its two joint owners, one of whom held the legal title to the land which he had placed in the name of the corporation for convenience. He held all of the stock of the corporation and the officers were simply his agents. A deed was made by his direction by the corporation to both of the original joint owners of the winery tract. This deed was left unrecorded, and was retained by the holder of the stock in the corporation. It was held that the title of the corporation was vested in both owners, and that the vendee of the other joint owner had the right to compel the execution of the necessary instruments to show that the title had so vested.²

§ 263. Evidence of intention.—Where a controversy arises as to whether a deed was delivered without authority by fraudulent collusion between the grantor's agent and the grantee, it is proper to show the offers communi-

¹ *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75. Said Nelson, J.: "No one can doubt from the account of the execution of the deed given by the commissioner, in connection with the previous preparation of it at the instance of Scrugham, that it was the *understanding and intent* of all parties at the time of the execution and acknowledgment that it was delivered, or in other words, that the family settlement was complete": See, also, *Roosevelt v. Carow*, 6 Barb. 190; *Rose v. Rose*, 7 Barb. 174; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Rathbun v. Rathbun*, 6 Barb. 98. But where a father signed and sealed a deed transferring land to his son, and left it with the scrivener with instructions to have it recorded, which was done, and the scrivener at the request of the grantor retained the deed in his hands until the death of the son, when the father reclaimed the deed and canceled it, the son having no knowledge of the circumstances, it was held that the conveyance was imperfect for want of delivery, and that the father was entitled to hold the land as against the heirs of the son: *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146. See, also, *Wankford v. Wankford*, 1 Salk. 299, 301; *Hatch v. Haskins*, 17 Me. (5 Shep.) 391; *Stilwell v. Hubbard*, 20 Wend. 44; *Mills v. Gore*, 20 Pick. 28; *Rogers v. Carey*, 47 Mo. 232; 4 Am. Rep. 322. This section is quoted approvingly by the Supreme Court of Montana in *Martin v. Flaharty*, 13 Mont. 96; 40 Am. St. Rep. 415.

² *Eshleman v. Henrietta Vineyard Co.*, 102 Cal. 199.

cated by the agent to the grantor as emanating from the grantee, and the instructions as to delivery given by the grantor to the agent.¹ Two brothers, A and B, lived together, A working for B. After the death of B, a bill was brought by A against the heirs of B to obtain a deed, which it was claimed had been delivered to him by B before his death. The delivery of the deed was denied, but it was proved and admitted that the deed had been executed and acknowledged. The deed was kept apparently in B's bureau drawer among other papers, but one of the witnesses for A testified that B delivered the deed to him for A. One of the defendants, however, testified that he saw B take the deed from the drawer and destroy it. The court held that there was not sufficient evidence to entitle the plaintiff to a decree.² The grantee is not affected by the fact that a deed executed by husband and wife was delivered by the husband against the wife's instructions, when the grantee did not know that the delivery was unauthorized.³

¹ *Adams v. Kenney*, 59 N. H. 133; *Reinhart v. Miller*, 22 Ga. 402; 68 Am. Dec. 506; *Blaisdell v. Leach*, 101 Cal. 405; 40 Am. St. Rep. 65. Where persons have had undisturbed possession for many years claiming under a deed signed "A per B" the deed will be presumed to have been signed in the presence and by the authority of the grantor, if he was unable to read or write, and the person signing as agent had been in the habit of signing deeds for him: *Kennedy v. Granling*, 33 S. C. 367; 26 Am. St. Rep. 676. Where the grantor has subsequently acknowledged the deed before a proper officer he is estopped from denying his signature: § 465 a, *post*.

² *Gorman v. Gorman*, 98 Ill. 361. *Dickey*, C. J., and *Walker*, J., dissented.

³ *Edwards v. Desmukes*, 53 Tex. 605. Where an exchange of lands had been agreed upon, and one of the parties laid his deed down on the table before the other, who took it and gave the former his deed, but, finding that it was a special warranty deed, objected to it and demanded a general warranty deed, and on not receiving it demanded the return of his own deed, it was held that the deed was not delivered: *McDonald v. Minnick*, 147 Ill. 651. Where the grantee has taken possession of the land described in the deed and has erected improvements, these facts show an intention on the part of the grantor to make an effectual delivery of the deed: *Williams v. Williams*, 148 Ill. 426; *McFall v. McFall*, 136 Ind. 122; *Sturtevant v. Sturtevant*, 116 Ill. 340; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 261; *Reed v. Douthit*, 62 Ill. 348.

§ 264. **When deed takes effect.**—As delivery is the final act necessary to the valid execution of a deed, it follows that the deed does not take effect until that time. And where the date and the day of delivery are different, it takes effect from delivery only, and not from date.¹ “A deed takes effect only from the date of its delivery, which may be either actual or constructive.”² Between the same parties, a deed may sometimes, for the furtherance of justice, be permitted, in its operation, to relate back to the time of a contract for the purchase of the land conveyed by the deed; but this effect will not be given to it when wrong would thereby be done to strangers.³ In an action to cancel and set aside a recorded deed, on the ground that it was never delivered, and that its possession was procured by the grantee by fraud, it is held in Colorado that, when the grantee is dead, that it is not sufficient to make the executor a defendant, but the heirs of the grantee must also be joined.⁴ The instrument has no legal existence as a deed, and no person can acquire

¹ *Bank of Healdsburg v. Bailhache*, 65 Cal. 327; *Harrington v. Gage*, 6 Vt. 532; *Mitchell v. Bartlett*, 51 N. Y. 453; *Harman v. Oberdorfer*, 33 Gratt. 497; *Blake v. Flash*, 44 Ill. 302; *Jackson v. Bard*, 4 Johns. 230; 4 Am. Dec. 267; *McDowell v. Chambers*, 1 Strob. Eq. 347; 47 Am. Dec. 539; *Anderson v. Lewis*, 1 Freem. Ch. (Mich.) 178; *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374; *Harrison v. Phillips' Academy*, 12 Mass. 456; *Fitzgerald v. Goff*, 99 Ind. 28; *Jackson v. Schoonmaker*, 2 Johns. 230; *McCants v. McConnell*, 1 Tread. 190; *Goodwin v. Whitfield*, 5 Ired. 162; *McDowell v. Chambers*, *supra*; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67.

² *Tuttle v. Turner*, 28 Tex. 759, 773, per Coke, J; *Fairbanks v. Metcalf*, 8 Mass. 230; *Hood v. Brown*, 2 Ohio, 266; *City Bank v. McClellan*, 21 Wis. 112.

³ *Jackson v. Bard*, 4 Johns. 230; 4 Am. Dec. 267. All stipulations contained in a prior contract to convey are merged in the deed: *Slocum v. Bracy*, 55 Minn. 249; 43 Am. St. Rep. 499. And see, also, §§ 850 a and 850 b, *post*.

⁴ *Snyder v. Voorhies*, 7 Col. 296. Parol evidence is inadmissible to show that a deed given as part of a bonus to aid the construction of a cable road, delivered, and purporting to vest the title unconditionally, was not to take effect if the road was not built on account of failure to secure additional sums as part of the bonus: *Blewett v. Front St. Cable Ry. Co.* (Cir. Ct. App.), 49 Fed. Rep. 126; affirmed, 51 Fed. Rep. 625; 2 C. C. A. 415; 7 U. S. App. 285.

rights under it where it has passed into the grantee's hands without the grantor's intention to make it operative.¹

§ 265. **Presumption as to time of delivery.**—The general presumption is, that a deed was delivered at the time it bears date.² Where a deed bears date of a certain day, and is acknowledged on a subsequent day, a difference of opinion prevails, as we have seen in the chapter on the formal parts of the deed, among courts as to the time at which, in the absence of proof, it is to be presumed to have been delivered. In most states the rule is adhered to strictly that the date of the deed is *prima facie* evidence of the time of its delivery, and this presumption is not allowed to be overcome by showing that it was acknowledged on a later day.³ But in other cases it is held that

¹ *Fitzgerald v. Goff*, 99 Ind. 28. See *Jones v. Loveless*, 99 Ind. 317.

² *Raines v. Walker*, 77 Va. 92; *Harman v. Oberdorfer*, 33 Gratt. 497; *Cutts v. York etc. Co.*, 18 Me. 190; *Deininger v. McConnell*, 47 Ill. 228; *Hall v. Benner*, 1 Pen. & W. 402; 21 Am. Dec. 394; *Ellsworth v. Central R. R. Co.*, 34 N. J. L. 93; *Meech v. Fowler*, 14 Ark. 29; *Harrison v. Phillips' Academy*, 12 Mass. 456; *Billings v. Stark*, 15 Fla. 297; *Geiss v. Odenheimer*, 4 Yeates, 278; 2 Am. Dec. 407; *Colquhoun v. Atkinson*, 6 Munf. 515; *McConnell v. Brown*, Litt. Sel. Cas. 462; 3 Wash. Real Prop. 286; *Faulkner v. Adams*, 126 Ind. 459; *Scobey v. Walker*, 114 Ind. 254. See § 178, *ante*.

³ *Darst v. Bates*, 51 Ill. 439. See *Sweetser v. Lowell*, 33 Me. 446; *Jayne v. Gregg*, 42 Ill. 413; *Breckenridge v. Todd*, 3 T. B. Mon. 52; 16 Am. Dec. 83; *Harris v. Norton*, 16 Barb. 264; *Ford v. Gregory*, 10 Mon. B. 175; *Robinson v. Gould*, 26 Iowa, 89; *McConnell v. Brown*, Litt. Sel. Cas. 459. In *Darst v. Bates*, *supra*, Mr. Justice Walker, who delivered the opinion of the court said: "But the trust deed bears date on the 13th day of October, 1856, and the notes are by it described as bearing even date therewith; and, in the absence of proof showing that it was executed on a different day, the date specified will be presumed to be the true date of its execution. It is true that it was not acknowledged until the 30th of that month, but that does not prove that it had not been executed before that time. And when it appears that the deed of trust and notes did not come to the hands of Bates until about the 3d or 4th of the next November, we may readily suppose that, although previously executed, it would only be acknowledged at the time the makers desired to forward it to Bates." "It is of little importance," says the court, in *Smith v. Porter*, 10 Gray, 66, 69, "that the deed was not acknowledged on the same day on which it purports to have been executed, but on the 17th of January, 1806. It is well known that in this common-

where there is no proof of delivery prior to the acknowledgment, and the acknowledgment is perfected on a day subsequent to the date of the deed, the deed must be presumed to have been delivered after its date.¹ These decisions proceed upon the ground that the acknowledgment of deeds and other instruments intended for record precede delivery in the usual course of business. The presumption that a deed was delivered on the day of its date cannot prevail against the positive averments in the acknowledgments that it was executed afterward, where the deed was executed and acknowledged on different days by parties living in different counties.² The presumption, however, as to the time of the delivery is not conclusive, and the time at which actual delivery was made may be shown by parol evidence. "That the date found in the body of the deed is presumptively the date at which it was

wealth, the title to land, followed by a corresponding seisin and possession, often passes by instruments of conveyance which are not duly acknowledged; and accordingly the law will not allow a title to fail on account of such omission, but has made suitable provision for supplying the defect of an acknowledgment where it is found to exist": See *Summers v. Darne*, 31 Gratt. 791.

¹ *Blanchard v. Tyler*, 12 Mich. 339; 86 Am. Dec. 57; *Clark v. Akers*, 16 Kan. 166; *Loomis v. Pingree*, 43 Me. 299; *Fontaine v. Boatman's etc. Bank*, 57 Mo. 553. See *Eaton v. Trowbridge*, 38 Mich. 454; *Brolasky v. Furey*, 12 Phila. 428.

² *Henderson v. Mayor etc. of Baltimore*, 8 Md. 352. In that case, Tuck, J., said, (p. 358): "The deed bearing date April 19th, executed as a compliance with the condition on which Shipley signed the application, and relied on by the appellees as evidence of ratification, cannot be considered as operative from its date even if it be otherwise sufficient to remove the objection. Deeds take effect from delivery. It is manifest that this was executed and acknowledged by some of the grantors after the 4th of May, and could not have been delivered on the day of its date. There was no proof as to the delivery other than what appeared on the instrument. Being a point arising upon its face unconnected with parol proof, it was for the decision of the court: *Barry v. Hoffman*, 6 Md. 78. Where deeds, as in this case, are executed and acknowledged in different countries, and necessarily on different days, the presumption arising from the date that the instrument was delivered on that day, cannot stand against the positive averment in the acknowledgment that it was executed afterward." See *Van Rensselaer v. Vickery*, 3 Lans. 57, where it was held that it would not be presumed that a deed was delivered until the cancellation of the revenue stamps.

delivered is not questioned; that this presumption, however, is not conclusive, but that the true date of delivery may be proved *aliunde* is also clear.¹ Notwithstanding that the rule is not uniform in all the states, the weight of authority and the better opinion is to the effect that, although a deed may be acknowledged on a day subsequent to its date, the date of the deed is nevertheless presumed to be the time at which delivery was made. Acknowledgment may have been made at a subsequent time, and as it may be impossible to tell from lapse of time when delivery was actually effected, the most satisfactory presumption to adopt is that the deed was delivered at its date, making this the time from which it will be presumed to be operative to pass the grantor's title.²

§ 266. **Verbal admissions.**—When it becomes material to inquire whether a deed was delivered at its date or some other time, the question to be solved is, when did the parties consider that the grantee had unconditional control of the deed.³ Where there is positive evidence that a deed was delivered at its date, and it is shown in addition to this that the deed was ready for delivery at that time, and that its delivery was practicable, evidence, consisting of verbal admissions, and the testimony of prejudiced parties, to establish a delivery at a different time, cannot be regarded as convincing in a proceeding in equity.⁴ But in the case of a forged instrument, there is no presumption that it was delivered at its date, or at any other particular time.⁵ Where a father has executed a

¹ *Treadwell v. Reynolds*, 47 Cal. 171; *Whitman v. Henneberry*, 73 Ill. 109. See, also, *Fairbanks v. Metcalf*, 8 Mass. 230; *Harrison v. Phillips' Academy*, 12 Mass. 456; *Barry v. Hoffman*, 6 Md. 78; *Cook v. Knowles*, 38 Mich. 316; *Saunders v. Blythe*, 112 Mo. 1.

² *Hardin v. Osborne*, 60 Ill. 93; *Harden v. Crate*, 78 Ill. 533; *Ellsworth v. Cent. R. R. Co.*, 34 N. J. L. 93; *People v. Snyder*, 41 N. Y. 402. See §§ 179, 181, *ante*.

³ *McCullough v. Day*, 45 Mich. 554.

⁴ *McCullough v. Day*, *supra*.

⁵ *Remington Paper Co. v. O'Dougharty*, 81 N. Y. 474. If the grantor named in the deed receives a lease of the property conveyed from the grantee, and both take the instruments to a bank and place them in

deed and placed it on record, and had previously declared his intention to convey the land, and said afterward that he had conveyed it, and the sons enter into possession of the land and make improvements upon it, the delivery and acceptance of the deed are sufficiently shown.¹

§ 267. Possession of deed surreptitiously obtained.

A deed which has been surreptitiously and fraudulently obtained from the grantor without his knowledge or consent, does not, even as against a subsequent purchaser without notice, transfer title.² "A deed purloined or stolen from the grantor, or the possession of which was fraudulently or wrongfully obtained from him without his knowledge, consent, or acquiescence, is no more effectual to pass title to the supposed grantee, than if it were a total forgery, and an instrument of the latter kind had been spread upon the record. The only question which can ever arise to defeat the title of the supposed grantor in such cases, is whether he was guilty of negligence in having made, signed, and acknowledged the instrument, and in suffering it to be kept or deposited in some place where he knew the party named as grantee might, if so disposed, readily and without trouble obtain such wrongful possession of it, and so be enabled to deceive and defraud innocent third persons. It might possibly be that a case of that kind could be presented where the negligence of the supposed grantor in this respect was so great, and his inattention and carelessness to the

the custody of the cashier, with an indorsement to deliver them to the grantor, and in case of her death, to the grantee, and if the grantor subsequently speaks of the conveyance as the grantee's deed, a finding from these facts may be made that the deed was delivered, and became operative in the grantor's lifetime: *Martin v. Flaharty*, 13 Mont. 96; 40 Am. St. Rep. 415.

¹ *Williams v. Williams*, 148 Ill. 426.

² *Gould v. Wise*, 97 Cal. 532; *Fitzgerald v. Goff*, 99 Ind. 28; *Henry v. Carson*, 96 Ind. 412; *Stokes v. Anderson*, 118 Ind. 533. See, also, *Healey v. Seward*, 5 Wash. 319; 31 Pac. Rep. 874; *Steel v. Miller*, 40 Iowa, 402; *Huey v. Huey*, 65 Mo. 689; *Hulton v. Smith*, 88 Iowa, 238; *Woodman v. Coolbroth*, 7 Greenl. 181; *Stevens v. Castel*, 63 Mich. 111.

rights of others so marked, that the law would on that account estop him from setting up his title as against a *bona fide* purchaser for value under such deed.”¹

¹ Per Dixon, C. J., in *Tisher v. Beckwith*, 30 Wis. 55; 11 Am. Rep. 546; *Henry v. Carson*, 96 Ind. 412. In *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314; where it was held that the fraudulent procurement of a deed deposited as an escrow from the depository, by the grantee, will not pass the title, and that a subsequent purchaser of the grantee for a valuable consideration, without notice, derives no title, and is not entitled to protection, Smith, J., in delivering the opinion of the court, said (p. 350): “We think that there can be no doubt that the fraudulent means used by Agnes to get possession of the deed from Zettler, the depository, are such as effectually preclude him from deriving any benefit from it. The testimony in this branch of the case is satisfactory. The deed was left with Zettler as an escrow, with instructions not to be delivered until certain securities should be given by Agnes. Until the performance of the condition, it was, and must remain, a mere scroll in writing, of no more efficacy than any other written scroll; but when, upon the performance of the condition, it is delivered to the grantee or his agent, it then becomes a deed to all intents and purposes, and the title passes from the date of the delivery. The delivery to be valid must be with the assent of the grantor. These are familiar principles, and do not require the citation of authorities to sustain them. If the grantee obtain possession of the escrow without performance of the condition, he obtains no title thereby, because there has been no delivery with the assent of the grantor, which assent is dependent upon compliance with the condition. The assent of the latter is withheld until the condition is performed. The obtaining of it by fraud, larceny, or any means short of the performance of the condition, is against the assent of the grantor, and as this assent is essential to delivery, and a delivery is essential to the validity of the deed, it is difficult to perceive how Agnes ever obtained any title whatever to the premises, and, of course, equally difficult to perceive how he could convey any by any conveyance which he might execute to another. The recording of an escrow does not make it a deed. Suppose Zettler had procured the deed to be recorded, and Swift had purchased of Agnes on the faith of the record title, without any delivery of the deed to Agnes, will it be claimed that Swift in such case would have obtained title? How is the case made better by the wrongful possession of the escrow by Agnes, obtained without the consent of Everts, and hence, without any delivery to him? It is true, all this might be done, and Swift, the purchaser, be quite innocent of any wrong. It is also true, that either Everts or Swift must suffer by the fraud of Agnes, the latter being unable to make reparation. But which has the prior or superior equity? Everts asks that he shall not be divested of his estate without his consent. Swift asks not only that Everts may be thus divested, but that he, himself, may be invested with it. It is quite apparent that the superior equity is with him who had the original title, with which he has never voluntarily parted. Swift has his remedy upon the covenants of his deed from Agnes. But

§ 268. Ratification of deed so obtained.—Where possession has been obtained surreptitiously of a deed which had never been delivered, it requires an express ratifica-

were the equities equally balanced, the legal title must prevail; that the legal title never passed from Everts, we think is clear both from reason and authority: 4 Kent's Com. 459; 5 Greenl. Cruise, tit. Deed, 45, 46; Jackson v. Catlin, 2 Johns. 248; 8 Johns. 429, 431; 3 Am. Dec. 415; Frost v. Beekman, 1 Johns. Ch. 296; Jackson v. Howland, 6 Wend. 666; Carr v. Hoxie, 5 Mason, 60; Jackson v. Sheldon, 9 Shep. 569; Robbins v. Belas, 2 Watts, 359; 1 Story's Eq. Juris. §§ 75, 76; *Somes v. Brewer*, 2 Pick. 184; 13 Am. Dec. 406; *Worcester v. Eaton*, 11 Mass. 373; 13 Mass. 371; 7 Am. Dec. 155. But it is contended that Swift is entitled to protection as a *bona fide* purchaser without notice. This has been a point of some difficulty. We have not been referred to, nor have we been able to find, an authority directly in point. We are aware that courts of equity go to great lengths to protect a *bona fide* purchaser for a valuable consideration without notice. The plaintiff cannot set up the fraud of his grantee in procuring a conveyance to defeat the title of a subsequent *bona fide* purchaser. But such, and all the cases referred to, differ from the case at bar, in the important fact that in all of them the conveyance was perfected by the voluntary act and with the assent of the grantor. He made the sale. He executed and delivered the deed, or caused the same to be done. All these acts were perfectly voluntary on his part, and no matter what fraudulent representations may have induced him to do these acts, an innocent third person shall not be made to bear his misfortune, or suffer for his credulity. Cases of this kind are numerous, and the principle on which they all depend is an equitable one. But they all depend, nevertheless, upon the fact that the party voluntarily parted with his property, and executed and delivered the evidences of its alienation. Not so, however, in the case of a forged or stolen deed. The reason is obvious. In the latter case there is no assent of the alleged grantor. There is no delivery. It is erroneous to suppose that Everts delivered the deed to Zettler, for Agnes, and thus made Zettler his agent, and is therefore bound by his acts. If the depository of an escrow can be considered the agent of the depositor at all (which we very much doubt), he is only such within the scope of his authority. He is as much the agent of the grantee as of the grantor. He holds the scroll for both, to be delivered on the performance of the condition. He is as much bound to deliver the deed on performance of the condition, as he is to withhold until performance. The act of delivery cannot be considered the act of the grantor until the condition be complied with. Without such compliance there is no assent to the delivery. To obtain the deed or scroll from the depository without such compliance, is as much against the assent of the grantor, as it would be to take it from the desk or drawer where the grantor had deposited it, without his knowledge or consent. It would seem, therefore, that there is a great and fundamental distinction between the case where by fraudulent representations a person is induced to execute and deliver a deed, and one

tion, or at least an acquiescence, after a knowledge of all the facts of such a character as would create a presumption of an express ratification to give force and effect to the deed. A deed thus obtained is considered to possess no greater validity than it would have if forged. Where reliance is placed upon the statute of limitations, possession for the full statutory time must be made out, and possession does not of itself raise the presumption of ratification.¹ A delivery, however, may be effected in law, where the grantor still retains the physical possession of the deed. A husband desiring to obtain an extension of time from his creditor, executed a deed to his wife, for the purpose of having her exhibit it to the creditor to create in his mind the impression that she owned the property. The husband deposited the deed with his other papers in the house where the wife had access to it, so that she might use it for the purpose designed, and she placed it on record. The court held that the legal control must be regarded as having been delivered to her, and this was equivalent to a delivery in law.²

where the deed or scroll is obtained from a depositary, without the knowledge or consent of the depositor or compliance with the conditions on which the delivery depends. It would seem that where a deed deposited as an escrow is obtained without performance of the conditions by operating upon the fears or credulity of the depositary, or by fraudulent collusion with him, or by other undue means, it bears a closer analogy in principle to the case of a forged or stolen deed than it does to that of a fraud practiced directly upon the grantor, by means of which he is induced to deliver it. In the latter case, the legal title passes, and a subsequent *bona fide* purchaser is protected. In the former, no title passes whatever, and a subsequent purchaser is not protected. In the one class of cases there is the voluntary assent of the grantor; in the other, there is no assent at all. If this reasoning be correct, the better opinion would seem to be, that the fraudulent procurement of a deed, deposited as an escrow, from the depositary by the grantee named in the deed, would not operate to pass the title, and that a subsequent purchaser for a valuable consideration without notice would derive no title, and would not be protected."

¹ Hadlock v. Hadlock, 22 Ill. 384.

² Gage v. Gage, 36 Mich. 229. Chief Justice Cooley says: "The testimony regarding the actual delivery of the deed by the husband to the wife is conflicting, but from all the evidence it is perfectly clear that whether the deed was actually placed in the wife's hands or not, it was

§ 268 a. Manner of ratification.—A grantor may ratify a deed surreptitiously obtained by acting as agent of the grantee, in renting the land, accounting to him for the proceeds, and paying the taxes in the grantee's name. And where such acts have continued for several years, the grantor will not be allowed to urge that a doubt as to his legal rights induced him to make such ratification.¹ But the ratification must be made by the grantor with full knowledge of his rights, because if the ratification has been secured by means of misrepresentation and undue influence, and the grantor has no independent advice and is ignorant of his rights, the ratification will not have the effect of validating the deed.²

§ 269. Manual delivery not requisite.—Actual manual delivery and change of possession are not required in order to constitute an effectual delivery. But whether

deposited where she could make use of it for the very purpose for which it was made. The actual custody was as much in her as in him, and as it was understood that she was to make use of it on occasion to show ownership in herself, the legal control must be regarded as delivered to her. And the act of the wife in taking the deed and placing it upon record, though it may not have been without the husband's knowledge, was in itself no wrong, if delivery in fact or in law had previously been made. We think a delivery in law is shown, and this is an end of the case. Fraud in procuring the deed is not relied upon, and complainant, having planted himself on the nondelivery, must fail when delivery is made out. He has executed a conveyance for the illegal purpose of delaying his creditor in the collection of his demand, and if the party he trusts in his unlawful attempt defrauds him, he must bear the consequences. Courts cannot occupy themselves with adjusting equities between wrongdoers. When parties associate for an unlawful purpose they must calculate in advance the probabilities of bad faith towards each other, and must expect no assistance of the law against each other's frauds." A deed placed in the hands of a stranger for safe-keeping is not delivered, and if he gives it to the grantee, it is not a valid delivery: *Barlow v. Hinton*, 1 Marsh. A. K. 97. But see *Berry v. Anderson*, 22 Ind. 41.

¹ *McNulty v. McNulty*, 47 Kan. 208. See, also, *Colton v. Gregory*, 10 Neb. 125; *Hadlock v. Hadlock*, 22 Ill. 384; *Waddell v. Latham*, 71 Miss. 351; 42 Am. St. Rep. 467; *Holbrook v. Chamberlin*, 116 Mass. 155; 17 Am. Rep. 146; *Tucker v. Allen*, 16 Kan. 312; *Titus v. Phillips*, 18 N. J. Eq. 541.

² *Martling v. Martling*, 47 N. J. Eq. 122.

there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case.¹ Where a father had indicated in various ways that certain property should be bestowed at his death upon his infant son, and for that purpose had executed a deed, of which he, however, retained the possession, effect was given to his intention, despite the fact that there had been no manual delivery of the deed.² In the Touchstone it is said: "If I take the deed in my hand, and use these or the like words, 'here, take it,' or 'this will serve,' or 'I deliver this as my deed,' or 'I deliver it to you,' these are good deliveries."³ In New York, under the statute abolishing the doctrine of resulting trusts, it was held that

¹ This language was quoted with approval in *Black v. Sharkey*, 104 Cal. 279.

² *Newton v. Bealer*, 41 Iowa, 334; *Shirley v. Ayers*, 14 Ohio, 303; 45 Am. Dec. 546; *Dukes v. Spangler*, 35 Ohio St. 119. In the first case, Day, J., says: "Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative simply because during life he might have done that which he did not do. It is much more consonant with reason to determine the effect of the deed by the intention existing up to the time of the death, than to refuse to give it that effect because the intention might have been changed. Applying this doctrine to the deed in question there can be no doubt that it should be sustained. The deceased, as he frequently declared, had made all the provisions for his other children that he intended to make, when within a very few days of his death, and evidently as appears, contemplating approaching dissolution, he says that he has his property all fixed, and points to the chest in which the deed would be found, which, as he supposed, had the effect to fix his property so that there would be no fussing about it when he was gone. He thus manifested an unequivocal intention within a very short time of his death, to have this deed operate as a disposition of his property, and any construction of the law which ignores this intention and defeats this purpose prefers shadow to substance. As bearing upon this question see *Masterson v. Cheek*, 23 Ill. 76; *Presley v. Walker*, 42 Ill. 311; *Souverbey v. Arden*, 1 Johns. Ch. 256; *Lessees of Mitchell v. Ryan*, 3 Ohio St. 382; *Cecil v. Beaver*, 23 Iowa, 242; 4 Am. Rep. 174." See, also, *Stow v. Miller*, 16 Iowa, 460; *Foley v. Howard*, 8 Iowa, 56, 60; *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75; *Tallman v. Cooke*, 39 Iowa, 402.

³ *Shep. Touch.* 58.

where a deed is made to another, at the request of the purchaser, and the latter receives and retains the deed, without disclosing its existence to the grantee, the title nevertheless passes by the deed and becomes vested in the grantee, freed from any trust in favor of the purchaser.¹ "The law does not prescribe any particular form of words or actions as necessary to consummate a delivery. Anything done by the grantor from which it is apparent that a delivery is thereby intended, either by words or by acts, or by both combined, is sufficient."² It is held that a formal sealing and delivery, without an actual delivery to the other party, where nothing else is expected to be done to complete the transaction, will be sufficient to give immediate operation to a declaration of trust, or deed, or mortgage.³

§ 270. Delivery of commissioner's deed.—At the time at which the court confirms the report of sale and conveyance of a commissioner appointed by a decree to sell and convey land in partition proceedings, a deed executed and acknowledged by him is delivered, although he retains manual possession of it.⁴

§ 271. Delivery for inspection.—A delivery of a deed for inspection, or a delivery to the grantee or his agent to be held while the grantee has under consideration the proposition whether he shall accept it or not, is not a valid delivery.⁵ An agent of a grantee during negotia-

¹ *Everett v. Everett*, 48 N. Y. 218.

² *Somers v. Pumphrey*, 24 Ind. 231, 239, per Elliott, C. J. See, also, *Dearmond v. Dearmond*, 10 Ind. 194; *Connelly v. Doe*, 8 Blackf. 320; *McNeeley v. Rucker*, 6 Blackf. 391; *Mallett v. Page*, 8 Ind. 364; *Folly v. Vantuyl*, 9 N. J. L. (4 Halst.) 153; *Pennsylvania Co. v. Dovey*, 64 Pa. St. 260; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Duncan v. Hodges*, 4 McCord, 239; 17 Am. Dec. 734.

³ *Linton v. Brown*, 20 Fed. Rep. 445.

⁴ *Cocks v. Simmons*, 57 Miss. 183.

⁵ *Gould v. Wise*, 97 Cal. 532; *Cherry v. Herring*, 83 Ala. 458; *Farmers and Traders' Bank v. Haney*, 87 Iowa, 101; *Pennington v. Pennington*, 75 Mich. 600; *Chick v. Sisson*, 95 Mich. 412; *Fairbanks v. Metcalf*, 8 Mass. 230; *Parker v. Parker*, 1 Gray, 409; *Overman v. Kerr*, 17 Iowa, 485; *Lee v. Richmond*, 90 Iowa, 695; *Corner v. Baldwin*, 16 Minn. 172;

tions for a conveyance of a parcel of land advanced a trifling sum of money to the grantor's attorney, and received a deed, on an agreement that it should be returned and the money refunded in the event that the conveyance was not accepted. Afterward the grantee's agent said he did not think it worth his while to take the property, and received back from the grantor's attorney the money advanced, promising to send the deed back to the grantor, but instead of doing this, he retained the deed and caused it to be recorded. The court held that there had been no valid delivery, and set aside the deed as a cloud upon the title of a subsequent purchaser from the original grantor.¹ "A deed," said Grover, J., "may be deposited with the grantee or handed to him for any purpose other than as the deed of the grantor, or as an effective instrument between the parties, without becoming at all operative as a deed."² A deed, although left in the hands of the

Brown v. Reynolds, 5 Sneed, 639, and other cases cited in notes to this section.

¹ *Ford v. James*, 2 Abb. N. Y. App. 159.

² *Ford v. James*, *supra*. In *Graves v. Dudley*, 20 N. Y. 77, the facts proven at the trial are thus stated by the reporter: "The plaintiff had negotiated with Royal Dudley and Levi G. Dudley, brothers of the defendant, in respect to a loan of two hundred and fifty dollars, to be made by them upon usurious terms. The loan was to be secured by the conveyance of certain lands to the plaintiff with an agreement for reconveyance upon payment. The deeds and contract were drawn by the defendant acting as the agent of his brothers. They were executed and offered to the plaintiff by the defendant when the former raised some question as to the validity of the acknowledgment of one of the deeds, and talked of taking the papers to counsel for examination. On the next day the defendant called on the plaintiff for the two hundred and fifty dollars, and it was handed to him upon his executing a paper reciting the receipt of the money, 'which I agree to deliver to Royal Dudley and Levi G. Dudley, provided there shall be found no mistakes in the conveyances or contracts this day delivered to the said Graves [describing them]. And if upon examination of said papers there shall be found any mistake or mistakes, they are to be immediately rectified, and the said contract [for reconveyance], delivered to the said Royal Dudley and Levi G. Dudley; and further, I agree to deliver the said two hundred and fifty dollars as above received at the time the said papers shall be rectified as above stated. John K. Dudley.' Some evidence was received under the defendant's exception of what was said at the time of delivering the above paper. The plaintiff, on the 15th of April,

grantee after its execution by the grantor, will not be effective as a valid instrument where the sole purpose of so leaving it was for transmission to a third person, with whom the parties had agreed it should remain until the occurrence of a specified event, at which time it should be finally delivered to the grantee and take effect.¹ So a deed may be delivered to the grantee named therein, for the purpose of awaiting complete execution or acknowledgment by another party, and such a delivery does not, in the absence of the further contemplated execution, give effect to the instrument.²

§ 272. Delivery to director of corporation.—If the grantee in the deed is a corporation, such as a bank, the handing of a deed to one of the directors of the grantee, upon the condition that it shall not be delivered until the settlement of a controversy between the parties to the deed, nor until the depositary is instructed to make the delivery, is not in any sense a delivery to the corporation.

demand the money of the defendant, and tendered to him the papers which he had received." The court held that there had been no valid delivery, and that plaintiff was entitled to a return of the money, saying, per Grover, J: "The title to the money depends upon the construction of the defendant's agreement made with the plaintiff. This shows that the deeds were not delivered to the plaintiff to take effect as perfect instruments either absolutely or upon condition, but for the purpose of examination by the plaintiff to ascertain whether the papers were right, and subject to future correction should they be found imperfect. Such a delivery did not transfer the title to the land to the plaintiff. The papers were not operative as conveyances until the examination was made and they were found correct, or if imperfect corrected."

¹ *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 43; 35 Am. Dec. 543.

² *Brackett v. Barney*, 28 N. Y. 333. See, also, *Hoag v. Owen*, 60 Barb. 34; *Fisher v. Hall*, 41 N. Y. 416; *Crosby v. Hillyer*, 24 Wend. 280; *People v. Bostwick*, 32 N. Y. 445; *Fonda v. Sage*, 48 N. Y. 173; *Worrall v. Munn*, 1 Seld. 229; 55 Am. Dec. 330; *Chouteau v. Suydam*, 21 N. Y. 179. Where the name of the grantee is omitted at the instance of one who claims to have a purchaser whose name will be inserted on delivery, and the possession of the deed is fraudulently obtained on the pretense of examining it, a person whose name is inserted as grantee acquires no title, because there has been no delivery: *Golden v. Hardesty* (Iowa, Jan. 30, 1895), 61 N. W. Rep. 913.

A delivery of the deed cannot be effectually made until the depositary receives the proper instructions to deliver it.¹

§ 273. **Deed delivered for examination, whether a contract of purchase.**—A deed delivered to the grantee for examination only, which, as we have seen, does not constitute a valid delivery, cannot, although it may be signed and acknowledged by the grantor, operate as a contract, or memorandum of a contract, for the conveyance of lands, so as to satisfy the requirements of the statute of frauds. In a case where the contention was made that a deed, invalid for want of an effectual delivery, might be considered as an agreement for the sale of land capable of specific enforcement, Mr. Justice McMillan, delivering the opinion of the court, said: "But it is claimed by the plaintiff that, although the delivery of a deed may not have been sufficient to pass the title to the land, yet it was sufficient to constitute a contract in writing, the specific performance of which the plaintiff is entitled to enforce. This position cannot be sustained; for to render a written contract to convey land operative, it is just as essential that the contract, or memorandum of the contract, required by the statute of frauds be delivered, as that a deed be delivered in order to convey the title to the land. And in this case, if the instrument was delivered at all, it was as a conveyance, not otherwise."² Another illustration may be given where the parties went together to an attorney, and had a deed drawn for the conveyance of a piece of land, for the sale of which there had been a previous oral agreement. The grantor signed

¹ *Bank of Healdsburg v. Bailhache*, 65 Cal. 327.

² *Comer v. Baldwin*, 16 Minn. 172, 176. See, also, *Overman v. Kerr*, 17 Iowa, 485, 490, sustaining the same rule; *Kopp v. Reiter*, 146 Ill. 437; 37 Am. St. Rep. 156. See, also, *Swain v. Burnette*, 89 Cal. 564; *Johnson v. Brook*, 31 Miss. 17; 66 Am. Dec. 547; *Freeland v. Charnley*, 80 Ind. 132. But see these cases where the deed has been considered in connection with other evidence: *Wood v. Davis*, 82 Ill. 311; *Work v. Cowhick*, 81 Ill. 317; *Jenkins v. Harrison*, 66 Ala. 345. And, contrary to the general rule, see *Johnston v. Jones*, 85 Ala. 286.

the deed, and the grantee made a part payment of the consideration price. Both parties examined the deed, and expressed themselves satisfied with its form, and afterward the grantor took it for the purpose of procuring from his wife a release of her right to dower. The court held that there was no delivery of the deed, and that, for want of a delivery, it could not operate as a deed, or as a memorandum in writing of the agreement.¹ It has been held, nevertheless, that if a parent, in consideration of love and affection, execute a deed to a member of his family, which is inoperative for want of delivery in the grantor's lifetime, yet equity will come to the aid of the grantee, and vest him with the legal title.² This case, however, while in apparent conflict with the decisions previously cited, may be distinguished from them. The conveyance was made to a member of the grantor's family, and this became in a sense a voluntary settlement, which equity favors, and uses every means to sustain. In Virginia, it seems a doctrine at variance with that above stated prevails. In that State, it is held that an undelivered deed is a sufficient memorandum to satisfy the stat-

¹ *Parker v. Parker*, 1 Gray, 409. Dewey, J., in delivering the opinion of the court, said: "The transaction, as respecting the acceptance of the deed by the grantee, or a delivery by the grantor, obviously was not closed. Something yet remained to be done before the deed was delivered and accepted by William N. Parker. If it was not so, the deed would have been passed over to William N. Parker at once. But the grantee required the release of dower of Mary Parker. The parties separated without any act having been done equivalent to a delivery of the deed, and nothing further was done to give effect to the instrument as a deed. The instrument was, therefore, not operative to pass any title, or lay the foundation for a bill in equity to recover possession of the deed. It was further urged that if the instrument was not valid as a deed, it might be considered as a memorandum in writing, signed by the party agreeing to convey the real estate therein described, and thus authorize a decree in equity to make a conveyance. But in regard to this, the same difficulty exists. As a memorandum in writing, stipulating to convey the land, to make it operative, it must have been executed and delivered to the plaintiffs, or some one in their behalf." See *Merriam v. Leonard*, 6 Cush. 151.

² *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35. And see *Souverby v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, 1 Johns. Ch. 329.

ute of frauds, although the cases in which this was held did not require a decision upon the question.¹

§ 273 a. **Canceling instructions for delivery.**—A grantor who has deposited a deed with another, to be delivered to the grantee upon certain terms, may cancel the instructions and recall the deed at any time before the terms have been fulfilled, if there is no valid executory contract to convey. Such a deed cannot be considered a memorandum in writing sufficient to satisfy the statute of frauds.² Where the grantor retains the right of control over the deed, it is not an escrow, notwithstanding it may have been deposited with a third person with instructions to deliver it to the grantee upon the compliance with certain specified conditions.³ Where a grantor places a deed in the hands of a third person, to be delivered upon the payment of the consideration, in pursuance of a correspondence in writing as to the purchase and sale of the land, agreeing on the terms but not describing the land, the grantor may at any time before payment destroy the deed. A subsequent purchaser with notice of these facts cannot be compelled to accept the purchase money and convey the property.⁴ "It is clear to our mind," said Mr. Chief Justice Elliott, "that a deed placed in the hands of a depositary, with directions to deliver it upon the performance of a designated condition by the grantee, may be recalled before performance. Until the grantee has in some manner assented to such

¹ *Bowles v. Woodson*, 6 Gratt. 78; *Parrill v. McKinley*, 9 Gratt. 1; 58 Am. Dec. 212. In the former case, it was not necessary to pass upon this point, because the court denied relief to the plaintiff upon the ground that he had been guilty of laches. But upon the subject referred to in the text, the court, per Allen, J., said: "The court is of the opinion that the contract between the parties for the sale and purchase of the land, in the bill and proceedings mentioned, was sufficiently evidenced by the deed, made and signed by him on the 21st of May, 1827, to relieve the case from the operation of the statute of frauds and perjuries." And see *Nay v. Mograin*, 24 Kan. 75.

² *Kopp v. Reiter*, 146, 437; 37 Am. St. Rep. 156.

³ *Campbell v. Thomas*, 42 Wis. 437.

⁴ *Freeland v. Charnley*, 80 Ind. 132.

deposit, there cannot be the semblance of a delivery, for every delivery implies an acceptance. Of course, if there is, back of the deposit of the deed, an enforceable contract, relief might be had; but in such a case the deposit of the deed would not supply the right of action—that would be supplied by the executory contract.”¹ Where a husband delivers a joint deed in the name of himself and wife, but signed by him alone, to an officer to procure the signature and acknowledgment of the wife, there is not a sufficient delivery of the deed to make it obligatory on him.²

§ 273 b. Offer to comply with terms of delivery.—An offer to comply with the terms upon which a delivery of the deed was made may prove unavailing where the grantor has canceled his instructions for the delivery. Thus a grantor, pursuant to an oral agreement for the sale of land, executed a deed to the grantee, and on the receipt of a small part of the purchase-money delivered it to a third person, with instructions to deliver it to the grantee if the latter should on the second day afterward deposit with such third person his notes for a certain sum secured by mortgage, and should pay to him for the grantor's use the balance of the price. Within the time specified, the grantee offered to the depositary the notes, mortgage, and money, but he, by the grantor's direction, refused to deliver the deed to the grantee, and the grantor at the same time tendered back to the grantee the money already paid, and upon the grantee's refusal to accept it left it with the depositary. The grantee brought an action against the grantor and the third person acting as depositary, to compel a delivery of the deed to him, but the court held that as the mortgage from the grantee had not been executed or deposited with the depositary contemporaneously with the execution and deposit of the grantor's deed, and, as this instrument did not contain all of the contract alleged and relied upon by the grantee,

¹ *Freeland v. Charnley*, 80 Ind. 132.

² *Johnson v. Brook*, 31 Miss. 17; 66 Am. Dec. 547.

there existed no valid contract between them, and the deed could not be considered an escrow.¹ So, in regard to an exchange of lands. If a deed of land is signed by the grantor in compliance with an oral agreement for the sale of lands, but is not delivered, and if it does not contain a memorandum of the oral agreement for the exchange of lands, it cannot be considered a sufficient memorandum of the oral agreement to take it out of the statute of frauds.²

§ 273 c. Undelivered deed in connection with other evidence.—A deed undelivered may be considered with other evidence as showing a valid contract for the sale of land. But the writings, notes, or memoranda, taken as a whole, must show the names of the parties, a sufficient description of the land to be conveyed, with the terms and conditions of sale, and the price or other consideration to be given. For instance, a person desiring to purchase land applied to the agent of the owner, and made him a definite offer, which the agent submitted by letter to the owner. The agent subsequently wrote to the purchaser that the owner had accepted the offer, and the agent sent to the owner a deed to be executed by him in accordance with the terms of the offer, which he executed and returned to the agent. The purchaser, when he received the letter notifying him that his offer had been accepted, went to the agent to consummate the transaction, but the agent refused to do so. The court held that these facts constituted a valid contract, not within the statute of frauds, for whose breach the purchaser might maintain a suit for damages against the owner.³ A purchaser at an administrator's sale went with the administrator to a scrivener immediately after the sale, and the administrator executed a deed and the purchaser signed a note for

¹ *Campbell v. Thomas*, 42 Wis. 437. See, also, *Cannon v. Cannon*, 26 N. J. Eq. 316; *Parker v. Parker*, 1 Gray, 409.

² *Swain v. Burnette*, 89 Cal. 564. But, contrary to the general rule, see *Johnston v. Jones*, 85 Ala. 286.

³ *Woods v. Davis*, 82 Ill. 311.

the purchase money. The deed and note were left with the scrivener with the understanding that he should retain them until the purchaser should procure security on the note in accordance with the terms of the sale. The administrator, it was held, could recover in a suit against the purchaser for a failure to comply with the terms of the sale.¹

§ 274. Delivery to officer taking acknowledgment.—

If a grantor delivers his deed to the officer taking the acknowledgment, with unqualified instructions to deliver it to the grantee at any time he may call for it, and the grantee accepts the title to the land conveyed, the delivery to the officer is sufficient to vest the title to the land in the grantee, although the latter, for the sake of convenience, may allow the officer to retain possession of the deed.² But it was held in New York, that the delivery of a deed to an attorney, whom the grantee employed to examine the title, and for that purpose alone, and who in fact did not assume to accept the deed, but held it for

¹ *Work v. Cowhick*, 81 Ill. 317. See, also, *Jenkins v. Harrison*, 66 Ala. 345, where it is held that a memorandum in writing purporting to contain the terms of a contract for the sale of the lands, and signed by both parties, is wanting in the certainty and definiteness requisite to a specific performance of the contract. Its defects may be supplied by instruments reciprocally executed a few days afterward as deeds but inoperative for want of a delivery.

² *Black v. Hoyt*, 33 Ohio St. 203, citing *Mitchell v. Ryan*, 3 Ohio St. 377; *Shirley v. Ayers*, 14 Ohio, 307; 45 Am. Dec. 546; *Steele v. Lowry*, 4 Ohio, 72; 19 Am. Dec. 581; *Hammell v. Hammell*, 19 Ohio, 17; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. And see *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478; *Adams v. Ryan*, 61 Iowa, 733; *Henrichsen v. Hodgen*, 67 Ill. 179; *Green v. Conant*, 151 Mass. 223; *Holt's Appeal*, 98 Pa. St. 257; *Martz v. Eggeman*, 44 Mich. 430; *Jamison v. Craven*, 4 Del. Ch. 311; *Orr v. Clark*, 62 Vt. 136. Where a deed is delivered to the scrivener for the grantee, the death of the grantor before the receipt of the deed by the grantee does not operate to defeat the delivery: *Colyer v. Hyden*, 94 Ky. 180. See, also, to same effect, *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671. But mere possession of the deed by the scrivener is not delivery to the grantee, though he may be the general agent of the grantee, because, in the particular transaction, the scrivener is the agent of the grantor by whom he was employed: *Healey v. Seward*, 5 Wash. St. 319.

the consideration of his client, cannot be considered an effective delivery, if the client declines afterward to accept the deed; and where the grantee had refused his consent to the delivery of the deed under these circumstances, neither he nor those claiming under him will be permitted to cut off the lien of an intermediate judgment by assuming the validity of the deed as so delivered.¹ In Delaware, however, in a recent case, it is held that a deed is delivered when properly signed, sealed, attested, and acknowledged in the presence of both parties and left with a notary by the grantor, although the grantee never called for it.² Where a grantee directed the notary public who drew the deed to send it to the county recorder for registration, but the officer placed the deed in his safe and for some months forgot to send it, it was held that the deed was delivered on the day on which it was made.³ If a husband executes a deed and leaves it with a notary for execution by the wife, the question of delivery is one of fact, dependent on the husband's intention at the time.⁴

§ 275. **Delivery to another for the grantee's use.**—It is not essential that the delivery of the deed should be made to the grantee personally. It may be made to some other person for his benefit. "A deed need not necessarily be delivered directly to the grantee himself. A delivery to any other person for him, and to his use, is sufficient. If it have passed beyond the control of the grantor by

¹ *Carnes v. Platt*, 7 Abb. Pr., N. S., 42.

² *Jamison v. Craven*, 4 Del. Ch. 311. See, also, *Walton v. Burton*, 107 Ill. 54; *Alexander v. Alexander*, 71 Ala. 295.

³ *Adams v. Ryan*, 61 Iowa, 733.

⁴ *Gilmore v. Morris*, 13 Mo. App. 114. Said Lewis, P. J., speaking for the court: "It is generally understood, that when a deed or other instrument signed by one person is to remain *in fieri*, until signed by another, there can be no valid delivery until such other shall have signed also. At the same time, the first signer may, if so disposed, make a complete execution and delivery as to himself, which will be binding on him whether the other signature be added or not." But the delivery must be with the intent that the deed shall take effect in favor of the grantee and it must be beyond the grantor's control: *Abbe v. Justus*, 1 Mo. App. Rep. 144.

his own act, accompanied with declarations that it is delivered for the use and benefit of the grantee, it shall have the same effect in the hands of the custodian, though a stranger, as if delivered to the party beneficially entitled."¹ Where the parties to a deed, conformably to their agreement, prepared, signed, and acknowledged a deed and left it with a justice of the peace for the grantee, Frazer, J., said: "Nothing is plainer in the law than that such facts constitute a good delivery of a deed."² Mr. Justice Sewell upon this point observes: "The delivery is an essential requisite to a deed, and the effect of it is to be from the time when it is delivered as a deed. But it is not essential to the valid delivery of a deed that the

¹ Woodward, C. J., in *Eckman v. Eckman*, 55 Pa. St. 269, 275; *Jones v. Swayze*, 42 N. J. L. 279; *Winterbottom v. Williams*, 152 Ill. 334; *Diehl v. Fowler* (Tex. Civ. App., May 15, 1895), 30 S. W. Rep. 1086; *Ells v. Railroad Co.*, 40 Mo. App. 165; *Trask v. Trask*, 90 Iowa, 318; 48 Am. St. Rep. 446; *Nye v. Lowry*, 82 Ind. 316; *Byington v. Moore*, 62 Iowa, 470; *McCormick v. McCormick*, 71 Iowa, 379; *Parker v. Parker*, 56 Iowa, 111; *McLaughlin v. McManigle*, 63 Tex. 553; *Haenni v. Bleisch*, 146 Ill. 262; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Rivard v. Walker*, 39 Ill. 413; *Rawson v. Fox*, 65 Ill. 200; *Skinner v. Baker*, 79 Ill. 496; *Crocker v. Lowenthal*, 83 Ill. 579; *Cook v. Patrick*, 135 Ill. 499; *Linton v. Brown*, 20 Fed. Rep. 455; *Squires v. Summers*, 85 Ind. 252; *Guard v. Bradley*, 7 Ind. 600; *Fewel v. Kessler*, 30 Ind. 195; *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726; *Loudon v. Todd*, 5 J. J. Marsh. 182; *Hayden v. Easter* (Ky. Jan. 18, 1894), 24 S. W. Rep. 626; *Mather v. Corliss*, 103 Mass. 568; *Green v. Conant*, 151 Mass. 223; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Marsh v. Austin*, 1 Allen, 235; *Foster v. Mansfield*, 3 Met. 412; 37 Am. Dec. 154; *Guess v. South Bound Ry. Co.*, 40 S. C. 450; *Black v. Hoyt*, 33 Ohio St. 203; *Vreeland v. Vreeland*, 48 N. J. Eq. 56; *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281; *Wesson v. Stephens*, 2 Ired. Eq. 557; *Duer v. James*, 42 Md. 492; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Peavey v. Treton*, 18 N. H. 151; 45 Am. Dec. 365; *Harris v. Hopkins*, 43 Mich. 272; 38 Am. Rep. 180; *Thatcher v. St. Andrews Church*, 37 Mich. 264; *Hosley v. Holmes*, 27 Mich. 416; *Ernst v. Reed*, 49 Barb. 367; *Diefendorf v. Diefendorf*, 132 N. Y. 100; *Munoz v. Wilson*, 111 N. Y. 295; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Fonda v. Van Home*, 15 Wend. 631; 30 Am. Dec. 77; *Holcombe v. Richards*, 38 Minn. 38; *Martin v. Flaharty*, 13 Mont. 96; 40 Am. St. Rep. 415; *Hamilton v. Armstrong*, 120 Mo. 597; *Crowder v. Searcy*, 103 Mo. 97; *Sneathen v. Sneathen*, 104 Mo. 291; 24 Am. St. Rep. 326; *Allen v. De Groodt*, 105 Mo. 442; *Turner v. Warren*, 160 Pa. St. 336; *Standiford v. Standiford*, 97 Mo. 231.

² *Fewell v. Kesler*, 30 Ind. 195.

grantee be present, and that it be made or accepted by him personally at the time. A writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, seems almost entirely nominal, when we consider the rules of decision which have been resorted to for the purpose of effectuating the intentions of the grantor or obligor, in some cases of necessity. If delivered as an escrow, and not in name as a deed, it will nevertheless be regarded and construed as a deed from the first delivery, as soon as the event happens, or the condition is performed, upon which the effect had been suspended, if this construction should be then necessary in furtherance of the lawful intentions of the parties."¹ And where a deed is thus placed, with the assent of the grantor, in the hands of a third person, the delivery is effectual, notwithstanding the fact that the deed may be lost while in the keeping of the third party.² Where a grantor with the intention of passing the title delivers a deed to the husband of the grantee, the title by such delivery is vested in the grantee.³ But where a deed of a wife's land was executed and acknowledged by her and her husband, and left with the husband for the purpose of delivering it to the grantee whenever he might choose to do so, and the husband retained the deed in his possession until after the death of the wife, and they had, since the execution of the deed, occupied the premises,

¹ *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67. See, also, *Hatch v. Bates*, 54 Me. 136; *Guest v. Beeson*, 2 Houst. 246; *Stephens v. Huss*, 54 Pa. St. 20; *Turner v. Whidden*, 22 Me. 121; *Cincinnati R. R. Co. v. Iliff*, 13 Ohio St. 235; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Peavey v. Tilton*, 18 N. H. 151; 45 Am. Dec. 365.

² *Henrichsen v. Hodgen*, 67 Ill. 179. But see *Logsdon v. Newton*, 54 Iowa, 448.

³ *Parker v. Parker*, 56 Iowa, 111. Where a father purchases land as a provision for his daughter of weak mind, having the deed made to her, delivery to him is delivery to her, and as the deed is beneficial to her, her acceptance will be presumed: *Eastham v. Powell*, 51 Ark. 530.

having built a house thereon, it was held that the deed had never been delivered.¹

§ 275 a. Death of grantor before actual delivery to grantee.—Where a father executes a deed in favor of his son, and delivers it to his wife, who accepts it in the presence of the son and with his consent, these facts, when accompanied by language evincing a present intent to deliver, constitute a good delivery, notwithstanding the deed may not be delivered to the son by the wife until after the death of the grantor.² Delivery to a stranger, with a reservation in the grantor to recall the deed, does not pass the title. But if the grantor with his wife executes a deed to their son, and delivers the deed in an envelope to another, with the statement that the contents of the envelope are for his son if anything should happen to him, the title passes and the deed takes effect upon the grantor's death by relation from the original delivery.³

§ 276. Assent of the grantee subsequent to the delivery.—When a grantee is ignorant of the execution of a deed which has been delivered to a stranger for the grantee's benefit, but when informed of the fact, accepts the conveyance, the deed becomes operative, and where the rights of third persons have not intervened, takes effect from the date of the first delivery.⁴ It was said by

¹ *Benneson v. Aiken*, 102 Ill. 284; 40 Am. Rep. 592.

² *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671. See, also, *Hall v. Hall*, 107 Mo. 101; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Scott v. Scott*, 95 Mo. 300; *Crowder v. Searcy*, 103 Mo. 117; *Standiford v. Standiford*, 97 Mo. 239; *Allen v. De Groodt*, 105 Mo. 449; *Sneathen v. Sneathen*, 104 Mo. 209; 24 Am. St. Rep. 326. But while the deed is in the hands of a third person, liens may accrue before delivery: *Stevens v. King*, 84 Me. 291. See § 280, *et seq.*

³ *Trask v. Trask*, 90 Iowa, 318; 48 Am. St. Rep. 446.

⁴ *McPherson v. Featherstone*, 37 Wis. 632; *Stewart v. Weed*, 11 Ind. 92; *Bennett v. Waller*, 23 Ill. 97; *Brown v. Austen*, 35 Barb. 341; *Bell v. Farmers' Bank*, 11 Bush, 34; 21 Am. Rep. 205; *Guard v. Bradley*, 7 Ind. 600; *Marsh v. Austin*, 1 Allen, 235; *Cook v. Patrick*, 135 Ill. 499; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Haenni v. Bleisch*, 146 Ill. 262; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Crocker v. Lowenthal*, 83 Ill. 579; *Rawson v. Fox*, 65 Ill. 200; *Blight v. Schenck*,

Mr. Justice Lindsay, who delivered the opinion of the court in a case in Kentucky, that: "A deed delivered to the registering officer or to an unauthorized third person, and subsequently accepted by the grantee, will take effect as

10 Pa. St. 285; 51 Am. Dec. 478; *Hammerslough v. Cheatham*, 84 Mo. 13; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Crowder v. Searcy*, 103 Mo. 97; *Rogers v. Carey*, 47 Mo. 232; 4 Am. Rep. 322; *Standiford v. Standiford*, 97 Mo. 231; *Hall v. Hall*, 107 Mo. 101; *Allen v. De Groodt*, 105 Mo. 442; *Tobin v. Bass*, 85 Mo. 654; 55 Am. Rep. 392; *Jamison v. Craven*, 4 Del. Ch. 311; *Black v. Hoyt*, 33 Ohio St. 203; *Linton v. Brown*, 20 Fed. Rep. 455; *Parker v. Parker*, 56 Iowa, 111. In *McPherson v. Featherstone*, *supra*, Cole, J., stated the facts and the law applicable to them as follows: "The leading facts in regard to the execution and delivery of the deed are in brief these: In 1844, Alexander McPherson, then an unmarried man, and brother of the plaintiff, immigrated to the territory of Wisconsin from Scotland, and purchased this and other lands, taking the title to all except the tract in question in his own name. He negotiated with one Boyce living near the land for the purchase, the owner, Webb, residing in Jefferson County, New York. Boyce acted as agent for Webb, and received the purchase money when paid. Alexander requested that the deed should be made to the plaintiff, and it was executed according to this direction or request. The deed was received by Alexander and retained by him until his death, all the while the plaintiff not knowing anything about the transaction. Alexander subsequently married, and died in July, 1853, disclosing before he died the state of the title and giving various reasons why the deed was taken in the name of the plaintiff. Alexander left a widow and two children. In September, 1853, the plaintiff was informed by the executor of the will that the land was conveyed to him, or that his name was put in the deed as grantee, and he seems to have immediately accepted the grant and ratified the acceptance of the deed by Alexander for his benefit. From this time various negotiations followed, conducted on one side by the executor or guardian of the infant children of Alexander, to procure from the plaintiff a quitclaim or release to the widow and heirs of his interest in the land; but from one cause or another all these negotiations failed, and the legal title apparently remained in the plaintiff at the commencement of this action. In considering the question of delivery, we lay out of view all questions as to who was the equitable owner, or whether there was a resulting trust in favor of Alexander, arising out of the alleged fact that he paid the whole purchase money. This feature of the case will be subsequently noticed. The material inquiry now is, do the above facts show a valid delivery of the deed? It is very evident that Webb intended to execute a conveyance which would be effectual to convey his estate, and that he parted with all control over the instrument. He undoubtedly intended to make a good delivery of the deed to the grantee, or to some one for his benefit. About this there is no possible room for doubt. He evidently intended the deed should take effect as a conveyance *in presenti*, and pass his estate.

between the grantor and grantee from the time of the first delivery; and in such case volunteers claiming under and through the grantor, and ordinary creditors who have acquired no lien upon nor interest in the estate conveyed, are entitled to no greater consideration than the grantor. Yet, until the grantee is informed of the execution of the deed and does some act equivalent to an acceptance of it, it is manifest that he may refuse to accept it, notwithstanding the fact that by a fiction of law the presumption of an actual acceptance had all the while existed for his benefit as against the grantor, his heirs, devisees, and ordinary creditors. But this fiction will not be allowed to prevail to the prejudice of persons who have acquired title to, an interest in, or a lien upon the property before the date of the actual acceptance. As in the case of an escrow, whenever it becomes necessary for the purposes of justice that the true time of the acceptance of a deed so

Alexander McPherson received the instrument knowing that at least it conveyed the legal title to the grantee. He assumed to act for the grantee in accepting the deed, and the plaintiff assented to, and ratified, his act as soon as he was informed of it. It seems to us that this amounted to a valid delivery of the conveyance. It is not denied that a deed may be delivered to a stranger for the benefit of the grantee, who may be ignorant at the time that it has been executed. If the grantee, when informed of the fact assents to and accepts the conveyance, the deed takes effect, providing the rights of third persons have not intervened: *Cooper v. Jackson*, 4 Wis. 537; *Turner v. Whidden*, 22 Me. 121; *Concord Bank v. Belles*, 10 Cush. 276; *Lessee of Mitchell v. Ryan*, 3 Ohio St. 377; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Welch v. Sackett*, 12 Wis. 244. And a delivery may be made good by a subsequent assent, though originally invalid for want of it, upon the principle *omnis rati, habitio mandato aequiparatur*: 3 Wash. Real Prop. ch. 4, § 2, p. 27. Here there was an absolute delivery of the deed by the grantor with the intent to pass the estate; and we must presume, on the absence of all evidence to rebut that presumption, that Alexander received the deed for the use and benefit of his brother, whose name, by his direction, had been placed in the instrument as grantee. And when the grantee, upon being informed of the transaction, ratified the delivery and assented to the grant, the deed took effect for the purposes intended. Indeed, many of the cases hold from the beneficial nature of the transaction, that an acceptance by the grantee will be presumed in the absence of proof to the contrary; but here there was an unequivocal assent and acceptance. This certainly amounted to a good delivery and vested the title in the plaintiff."

delivered shall be ascertained, the legal fiction will be disregarded, and the intervening claimant or lienholder allowed to show the actual facts of the transaction."¹ Hence, it has been held that where a deed is delivered without the grantee's knowledge to a third person, not authorized to receive it, the rights of the grantor's creditors attaching subsequently to such delivery, and prior to the manifestation of the grantee's assent, are not affected, notwithstanding the beneficial nature of the deed to the grantee. The assent of the grantee under these circumstances is not considered as relating back to the time of the delivery.² The assent of the grantee is essential to the payment of a debt by the execution and delivery of a deed, and no title is transferred until such assent is given.³

§ 277. **Where there are several grantors.**—Where there are several joint owners who intend to convey the land held by them by a deed to be executed by all, and all but one of them join in executing a deed, which is delivered to a third person to obtain the signature of the other owner and then to deliver it to the grantee, the deed is not delivered as to those who have signed unless the other grantor also execute it.⁴ Thus, by the terms of a deed

¹ In *Bell v. Farmers' Bank*, 11 Bush, 34, 39; 21 Am. Rep. 205. And see *Goodsell v. Stinson*, 7 Blackf. 439; *Kennard v. Adams*, 11 Mon. B. 102; *Ensworth v. King*, 50 Mo. 477.

² *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726. Where a deed is made without the knowledge or consent of a person he will become bound by it by recognizing its validity: *Huffman v. Mulkey*, 78 Tex. 556; 22 Am. St. Rep. 71.

³ *Cravens v. Rossiter*, 116 Mo. 345; 38 Am. St. Rep. 606. An intervening judgment lien is not cut off by a subsequent ratification and acceptance of the deed: *Cravens v. Rossiter*, *supra*.

⁴ *Overman v. Brown*, 17 Iowa, 485. In that case John M. Overman, Wm. P. Overman, D. C. Overman, and Edwin Brown, the plaintiffs, held land in partnership, and being desirous that the county seat should be located in their village, agreed, as an inducement to the commissioners to select that place for the purpose, to donate fifty lots to the county. The three Overmans executed a deed for these fifty lots which contained this reservation: "That in the event the county seat should, at any time, be removed from Cedar Falls, then the title to all of the aforesaid

of partition, embracing a number of tenants in common as parties, each party conveyed and released his undivided interest in the whole property in consideration of receiving a conveyance of the undivided interests of the others in a specified portion; most of the parties, but not all, signed this deed, but it was held that as to those who did sign, it could not be considered a valid deed, and they still retained their interests in the land as tenants in common. "In the absence of any other circumstance than what appears on the face of the instrument," says the court, "we think it cannot be held that this agreement was executed by the plaintiff's grantors, and delivered to take effect like a deed-poll, upon their affixing their own signatures, but that it was an inchoate instrument, only to become effective when executed by all the persons named as parties. Certain cases are cited by the plaintiff, in which instruments have been held operative when not executed by all the parties. Without entering into a separate examination of each case, it will suffice to

lots which shall, at the time of such removal, remain unsold by the county, shall revert back to us, with all improvements thereon." The deed was drawn by Dr. Brewer, one of the commissioners. The Overmans made objections to the deed on the ground that it did not state all the terms upon which they were to make the donation, but signed and acknowledged the deed and left it with the notary, who took the acknowledgment for the purpose of having Brown, who was then absent, execute and acknowledge it. The notary presented the deed to Brown on his return, and he signed it, and then said he desired to examine it and see what he had signed before he made the delivery. He read the deed, and at once said that he was dissatisfied with the condition contained in it, and refused to deliver it to the notary, and the deed ever since that time had been in the plaintiff's possession. The court, per Dillon, J., said: "The fair weight of evidence is to the effect that the execution of the deed by the Overmans was with the express understanding that the notary should retain it to obtain Brown's signature, and was not authorized to deliver it to the commissioners or to the county, and that it was never so delivered, either by the Overmans or by the notary. Without Brown's signature the instrument was immature—not complete—and it was intended by the plaintiffs to be delivered when it was made perfect, and not before. And, in general, an instrument will not be regarded as delivered, when anything remains to be done by the parties by whom the delivery is to be made: *Parker v. Parker*, 1 Gray, 409." See, also, *Batchelor v. Brereton*, 112 U. S. 396.

say that they are cases in which, from the terms of the instrument, or from the nature of the subject matter of the contract, it appeared that it was the intention of the parties who signed to be bound, without reference to an execution by all the parties, or where, by acting under it with a knowledge that it had been fully executed, the parties had become estopped from denying its obligation upon them. Considered, therefore, as a conveyance, we think the agreement in question was void as against the defendant's grantors, and gave no title to the grantors of the plaintiff."¹ Where the vendee has fully paid the consideration of a deed executed by tenants in common, and one of the tenants in common dies, the delivery of the deed after his death by the other tenant in common, or by some person who has received it for that purpose, is a valid delivery.²

§ 278. **Constructive delivery.**—The grantee may retain possession of the deed, and still it may be constructively delivered. Thus, an owner of land executed a deed of it to a firm of which he was a member, but kept the deed in his possession. His retention of the deed was considered to be a constructive delivery to the firm.³ There are many cases where a deed has been held to be delivered, although it has remained in the custody of the grantor, but in such cases the transaction has been fully consummated, and some agreement has been made or consideration paid by the grantee; or there have been other facts showing an intention on the part of the grantor to deliver the deed, and on the part of the grantee to accept it. It is said by Chancellor Kent: "If both parties be present, and the usual formalities of execution take place, and the con-

¹ *Tewksbury v. O'Connell*, 21 Cal. 60, 69, per Norton, J. See *Tustin v. Faught*, 23 Cal. 237; *Colton v. Seavey*, 22 Cal. 496; *Townsend v. Corning*, 28 Wend. 435; *Livingston v. Rogers*, 1 Caines, 584. As to enforcing a contract to convey against one joint owner who has signed an agreement intended to be signed by the other owners, see *Jackson v. Torrence*, 83 Cal. 521; *Olson v. Lovell*, 91 Cal. 507.

² *Holt's Appeal*, 98 Pa. St. 257.

³ *Henry v. Anderson*, 77 Ind. 361.

tract is to all appearances consummated, without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor."¹

§ 279. **Delivery after death of the grantor.**—The general rule undoubtedly is that, where a deed remains in the possession of the grantor, to be delivered and take effect after his death, the deed is void for want of a delivery during his lifetime.² There are some qualifications to this general rule, as where the delivery of the deed is

¹ 4 Kent's Com. 456. For various cases in which a deed has been held to have been delivered though its custody was retained by the grantor, see *Thompson v. Easton*, 31 Minn. 99; *Wallace v. Berdell*, 97 N. Y. 13; *Regan v. Howe*, 121 Mass. 424; *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75; *Stevens v. Hatch*, 6 Minn. 64; *Snow v. Orleans*, 126 Mass. 453; *Glaze v. Three Rivers Farmers' Mut. F. Ins. Co.*, 87 Mich. 349; *McLaughlin v. McManigle*, 63 Tex. 553; *Weisinger v. Cock*, 67 Miss. 511; 19 Am. St. Rep. 320; *Haeg v. Haeg*, 53 Minn. 33; *Jamison v. Craven*, 4 Del. Ch. 311; *Alexander v. Alexander*, 71 Ala. 295; *Seibel v. Rapp*, 65 Va. 28; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Cannon v. Cannon*, 26 N. J. Eq. 116; *Harris v. Saunders*, 2 Strob. Eq. 370; *Young v. Caldwell*, 6 Lea, 168; *Tallman v. Cooke*, 39 Iowa, 402; *Bliss v. West*, 58 Hun, 71; *Vought v. Vought*, 50 N. J. Eq. 177; *Steele v. Lowry*, 4 Ohio, 72; 19 Am. Dec. 581.

² *Goodlett v. Kelly*, 74 Ala. 213; *Jackson v. Leek*, 12 Wend. 107; *Fay v. Richardson*, 7 Pick. 91; *Wiggins v. Lusk*, 12 Ill. 132; *Miller v. Physick*, 24 Ark. 244; *Herbert v. Herbert*, Breese, 354; 12 Am. Dec. 192; *Fisher v. Hall*, 41 N. Y. 423; *Ball v. Foreman*, 37 Ohio St. 139; *Jones v. Houston*, 5 Jones (N. C.), 302; *Martin v. Ramsey*, 5 Humph. 349; *Jones v. Loveless*, 99 Ind. 317; *Miller v. Lullman*, 81 Mo. 311; *Lang v. Smith*, 37 W. Va. 725; *Cazassa v. Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Cline v. Jones*, 111 Ill. 563; *Parrott v. Avery*, 159 Mass. 594; 38 Am. St. Rep. 465; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *Bovey v. Hinde*, 135 Ill. 137; 25 N. E. Rep. 694; *Denis v. Velati*, 96 Cal. 223; *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131; *Sauter v. Dollman*, 46 Minn. 504; *Martling v. Martling*, 47 N. J. Eq. 122; *Stinson v. Anderson*, 96 Ill. 373; *McElroy v. Hiner*, 133 Ill. 156; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Gorman v. Gorman*, 98 Ill. 361; *Miller v. Murfield*, 79 Iowa, 64; *Duraind's Appeal*, 116 Pa. St. 93; *Allen v. De Groodt*, 105 Mo. 442; *Huey v. Huey*, 65 Mo. 689; *Otto v. Doty*, 61 Iowa, 23; *Anderson v. Anderson*, 126 Ind. 62; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *Williams v. Schatz*, 42 Ohio St. 47; *Weisinger v. Cock*, 67 Miss. 511; 19 Am. St. Rep. 320; *Reichart v. Wilhelm*, 83 Iowa, 510. See *McLaughlin v. McManigle*, 63 Tex. 553.

complete during the grantor's life, but the time it is to take effect is postponed till the grantor's death, and other modifications which shall be presently noticed. In support of the general proposition, reference may be made to a case where a father executed and acknowledged a deed for a piece of land upon which he resided, making his children grantees; he did not record or deliver the deed, stating, as one reason for this action, that if he retained possession of the deed, he might sell the land for the minors, and this he could not do if he parted with the possession of the deed, and they, being minors, would also be unable to sell. The deed having remained in the father's possession until his death, was held invalid for want of delivery.¹

¹ *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212. Mr. Justice Walker delivered the opinion of the court, and said: "The first question we propose to consider is, whether the deed executed by Thomas Whitson ever became operative to pass the title to the grantees named in the deed—whether there was such a delivery as passed the title to the land from him to them. On the one side it is claimed there was, and on the other it is insisted there was no delivery. The question as to what acts are necessary to constitute a sufficient delivery to render a deed operative, and to pass the title to the land, has been the subject of much discussion in this court. It is held that a delivery is essential to render a deed operative, and it does not take effect until it is delivered: *Skinner v. Baker*, 79 Ill. 496; *Blake v. Fash*, 44 Ill. 302. It may be delivered to the grantee, or to his agent. Nor is any particular form or ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor, and of the grantee, that the deed shall at once become operative to pass the title to the land conveyed, and that the grantor loses all control over it: *Bryan v. Wash*, 2 Gilm. 557. It has been held that, where a deed is executed and delivered to even a stranger, to be delivered to the grantee, without condition, it will be a sufficient delivery to pass the title: *Rawson v. Fox*, 65 Ill. 200. But the execution of a deed, and having it placed on record, without the knowledge of the grantee, is not a delivery: *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *Krebaum v. Cordell*, 63 Ill. 23. But in such a case the subsequent assent will be sufficient: *Dale v. Lincoln*, 62 Ill. 22. In *Gunnell v. Cockerill*, 79 Ill. 79, it was held that any act which clearly manifests an intention of the grantor, and the person to whom it is delivered, that the deed shall presently take effect and become operative, and the grantor loses all control over it, is a sufficient delivery. In all cases the intention of the grantor to part with its possession and control enters largely into the question of delivery. When the facts show that the grantor did not intend to lose control of the deed, and still continues to

"For we consider it indispensable to the delivery of a deed, that it shall pass beyond the control or dominion of the grantor; otherwise it cannot come rightfully within the power and control of the grantee. Their interests are adverse, and both cannot lawfully have control over the deed at the same time. The grantee does not necessarily acquire the right the moment it leaves the possession and control of the grantor, but he cannot have it before. Neither can the grantee transfer his property, after his decease, by deed. The statute of wills, or of descent, then, govern all property not disposed of during the lifetime of the owner."¹ Where a grantor caused a deed to be prepared, and having signed, sealed, and acknowledged it, inquired whether the deed would give the land to his daughter, in whose favor it was made, and was advised that it would, but retained the land in his possession until his death, it was held that the deed was inoperative for the want of delivery.² Nor unless there has been a

have power over the title, without the consent of the grantee, there is not such a delivery, as the law requires to render it a deed, and it cannot pass title. In this case, Thomas Whitson, so far from manifesting such an intention, on the contrary retained the deed, and declined to have it recorded, on the express ground that he would thereby place the title beyond his power to control it. He also expressed the intention, after he had made and acknowledged it, to sell the land, if he could do so, at six thousand dollars, and, in pursuance of that intention, he did offer to sell it. Instead of his doing or saying anything indicating an intention to deliver the deed, his declarations and acts clearly prove that he did not intend to deliver the deed, or place the title in the grantees. Under none of the cases referred to can it be held that there was a delivery, but they all hold that there could not, under the facts of this case, have been a delivery, and, there being no delivery, the complainants took no title under the deed." See, also, *Reed v. Douthet*, 62 Ill. 348; *Stenson v. Anderson*, 96 Ill. 373.

¹ *Brown v. Brown*, 66 Me. 316, 321, per Virgin, J. See, also, *Huey v. Huey*, 65 Mo. 689; *Shurtleff v. Francis*, 118 Mass. 154; *Patterson v. Snell*, 67 Me. 559; *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35. Where a grantor places a deed in a locked box, and delivers the same to a servant with the statement that it contains a deed, but not mentioning the name of the grantee, and directs that the box be not opened until after the grantor's death, there has been no legal delivery: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131.

² *Stilwell v. Hubbard*, 20 Wend. 44. Say the court, per Bronson, J: "The grantor kept the deed himself. He did not intend it should be an

prior delivery, is a delivery through the mail by a third person after the grantor's death operative.¹ An owner of land and his wife made a deed of it to their daughter, who was then four months old, and properly acknowledged the execution of the conveyance. When the acknowledgment was taken the father said, "she is early in acquiring property"; and handed the deed toward her, without putting it into her hands. He did not have the deed recorded, but kept it among his papers, where it was found after his death. Prior to his death he conveyed the same premises to a trustee for the use of the child for life, with a remainder over. The court considered it to be clear, when a claim was made to the land through the deed, that the deed was not intended as a completed transaction, and there had been no valid delivery of it.² So there was considered to be no delivery of a deed where the grantor, having signed, sealed, and acknowledged it, inclosed in it a slip on which was written a statement that he had deposited the deed for safekeeping, directing that it be given to his grandchildren, and placed it in a bank with his other documents, where on his death four years subsequently it was found.³

§ 279 a. **Some illustrations.**—A deed was executed and acknowledged, and though ready for delivery was not delivered to the grantee, but was placed in a drawer in which the grantor was in the custom of keeping his papers. The grantor's will was executed at the same

operative conveyance so long as he lived; and if it was his settled purpose that Altie should have the land after his death, he has not taken the proper legal means for carrying that intention into effect. We cannot uphold this deed without overturning well-settled principles." See, also, *Jackson v. Phipps*, 12 Johns. 418. Where a deed from a father to a son is found by the administrator after the father's death in his desk, among his papers, and was delivered by the administrator to the son, the latter has the burden of proof to show delivery: *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337.

¹ *Otto v. Doty*, 61 Iowa, 23.

² *Ireland v. Geraghty*, 15 Fed. Rep. 35.

³ *Davis v. Williams*, 57 Miss. 843. And see *Goodlett v. Kelly*, 74 Ala. 213.

time and was placed, together with the deed, in the same drawer. The will and deed were found after the grantor's death in the drawer in which they had been placed, but it was held that the deed was void for want of delivery.¹ A father executed to his son, a youth of twelve years of age, two deeds, providing in one, that title was to vest on a formal delivery to occur in the future, no delivery being intended at the time of execution, and conveying in the other the property in which the family were living. After the father's death, the deeds were found among his papers, and no member of the family had previously been informed of their execution. The father up to the time of his death continued to rent, insure, and manage the property in his own name. Under these circumstances, the court held, that there never was any delivery or present intention to deliver the deeds.² A father made and executed a deed in favor of his children, and then handed it to his wife, and told her to take care of it. No delivery of the deed was made to the grantees, or to any one for them, until after the husband's death. The court considered that it was the intention of the grantor

¹ *Lang v. Smith*, 37 W. Va. 725. Mr. Justice Holt delivered the opinion, and after quoting several authorities and the text of section 280 of this work, as stating the correct rule, said: "In this case the deed in question was executed ready for delivery, but the power of dominion over the deed was not parted with by anything said or done. It was laid away in decedent's drawer where he kept his papers, together with his will made at the same time, and like the will it was ambulatory, not legally fixed or settled past destruction or alteration. It is nothing more than a will defectively executed and void under the statute. The grantor died without parting with his possession of the deed, or his right of control over it. It was not delivered during his life, and after his death no one had the power, express or implied, to deliver it. On the contrary, by what he said a few days before his death, he regarded it as under his control, as well as in his possession, and so far from delivering it or directing it to be delivered after his death, he ordered it to be destroyed; and, although the delivery of the deed, like any other fact, may as well be inferred from circumstances as proved by positive testimony (2 Minor Inst. 733), yet no circumstances are shown by competent testimony, in this case, from which any such inference can be fairly drawn."

² *Cazassa v. Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112; 22 S. W. Rep. 560.

to keep control over the instrument, until he became fully determined ultimately to deliver it or not, and hence decided that the deed was void for want of a valid delivery.¹ Where an unrecorded deed of partition is found among the papers of a decedent, who was as much entitled to its possession as the other parties to the deed, no presumption against its delivery will be indulged.² If a deed is placed in the hands of one of the grantees, with the understanding that it shall be returned to the grantor if he should ask it, and in the absence of such a request is to be placed upon record after the grantor's death, there is not a valid delivery.³

§ 280. Absolute delivery to a third person to hold until the grantor's death.—Where a grantor executes a deed and delivers it to a third person to hold until the death of the grantor, the latter parting with all dominion over it, and reserving no right to recall the deed or alter its provisions, it seems to be settled by the weight of authority that the delivery is effectual, and the grantee, on the death of the grantor, succeeds to the title.⁴ A delivery of this kind may be considered, in effect, an escrow, but differs from that in the fact that a delivery in escrow is dependent upon the performance of some event, and not upon the lapse of time. In a case in Massachusetts, where a delivery of this character was held good, Chief Justice Shaw, in delivering the opinion of the court, remarked: "Whether, when a deed is executed and not immediately delivered to the grantee, but handed to a stranger to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often matter of some doubt, and it will generally depend rather on the words used and the pur-

¹ Colyer v. Hyden, 94 Ky. 180; 21 S. W. Rep. 868. See a case where a deed was held to have been delivered on the evidence adduced: Cummings v. Glass, 162 Pa. St. 241.

² Smith v. Adams, 4 Tex. Civ. App. 5.

³ Wilson v. Wilson, 158 Ill. 567; 49 Am. St. Rep. 176.

⁴ This portion of the text is quoted as the law in Lang v. Smith, 37 W. Va. 725; 17 S. E. Rep. 213.

poses expressed, than upon the name which the parties give to the instrument. Where the future delivery is to depend upon the payment of money or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but, when thus delivered, it will take effect by relation from the first delivery."¹ A person executed a

¹ *Foster v. Mansfield*, 3 Met. 412, 415; 37 Am. Dec. 154. See, also, *Latham v. Udell*, 38 Mich. 238; *Wallace v. Harris*, 32 Mich. 380; *Wheelright v. Wheelright*, 2 Mass. 447; 3 Am. Dec. 66; *Gilmore v. Whitesides*, *Dudley's Eq.* 14; 31 Am. Dec. 563; *Stephens v. Rinehart*, 72 Pa. St. 434; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Mather v. Corliss*, 103 Mass. 568; *Carter v. Mills*, 30 Mo. 439; *Cooper v. Jackson*, 4 Wis. 551; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Hathaway v. Payne*, 34 N. Y. 92; *Church v. Gilman*, 15 Wend. 661; 30 Am. Dec. 82; *Miller v. Meers*, 155 Ill. 284; *Dinwiddie v. Smith*, 141 Ind. 318; *Campbell v. Morgan*, 68 Hun. 490; *McCalla v. Baine*, 45 Fed. Rep. 828; *Standiford v. Standiford*, 97 Mo. 231; *Bury v. Young*, 98 Cal. 446; 35 Am. St. Rep. 186; *Crowder v. Searcy*, 103 Mo. 97; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Burke v. Adams*, 80 Mo. 504; 50 Am. Rep. 510; *Williams v. Latham*, 113 Mo. 165; *Rogers v. Carey*, 47 Mo. 232; 4 Am. Rep. 322; *Huey v. Huey*, 65 Mo. 689; *Rothenbarger v. Rothenbarger*, 111 Mo. 1; *Allen v. De Groodt*, 105 Mo. 442; *Loveland v. Loveland*, 136 Ill. 75; *Stone v. Duvall*, 77 Ill. 475; *Hill v. Hill*, 119 Ill. 242; *Smiley v. Smiley*, 114 Ind. 258; *Squires v. Summers*, 85 Ind. 252; *Owen v. Williams*, 114 Ind. 179; *Goodpaster v. Leathers*, 123 Ind. 121; *Hockett v. Jones*, 70 Ind. 227; *Regan v. Howe*, 121 Mass. 424; *Albright v. Albright*, 70 Wis. 528; *Le Saulnier v. Loew*, 53 Wis. 207; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; *Diefendorf v. Diefendorf*, 132 N. Y. 100; *Rousseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578; *Munoz v. Wilson*, 111 N. Y. 295; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Woodward v. Camp.*, 22 Conn. 457; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *Ball v. Foreman*, 37 Ohio St. 132; *Williams v. Schatz*, 42 Ohio St. 47; *Crooks v. Crooks*, 34 Ohio St. 610; *Egerton v. Carr*, 94 N. C. 648; 55 Am. Rep. 630. A grantor, Francis B. French, who had formed the intention of giving, at his death, certain land to his brother, Dudley S. French, unless he should sell the same during his lifetime, wrote a letter to his brother, in which he said: "In case I should drop off, you can take possession of the land, and do with it as you please. When I have paid the land out, if not sold, I will make a deed to it to you, inclose it in an envelope, direct it to you, to be mailed in event of death, which would make it sure to you without expense or trouble." Nearly a year afterward he signed a warranty deed for the property to his brother as grantee, and

deed in favor of his married daughter, and, having acknowledged the instrument, placed it in the hands of a third party, with directions to have it recorded, and to hold it without delivery until the grantor's death. The

acknowledged it before an officer, S. Michaels. The deed contained the words "Signed, sealed, and delivered in the presence of S. Michaels"; but it was never, in fact, delivered. The grantor died, owning and retaining possession of the land. During all of this time he was unmarried, and left no child, father, or mother, but left several brothers. No person, other than the grantor named in the deed and the officer who took the acknowledgment, ever saw the deed or knew of its existence, until about half an hour before the grantor died, when it was found inclosed in an envelope, with a letter, in a cigar-box, in the drawer of a table, in the residence of the grantor. Indorsed on the envelope were these words: "This deed to be placed in the recorder's office at Erie, Kansas, for record, and the accompanying letter to be mailed as per direction thereon." The grantor, at the time the deed was discovered, was speechless and unconscious, and continued in that condition until his death, which occurred about half an hour afterward. The person who found the deed immediately telegraphed to the grantee, Dudley S. French, who resided in Illinois, and on his arrival at the place where the grantor died, the deed was delivered to him. This was the first time the grantee ever saw the deed, and he never knew of it until after the grantor's death. Four days after the grantor's death, the grantee filed the deed for record, and entered into possession of the land, and remained in possession until he sold the land to one John Stone, who was his brother in law, and for a time lived at his house. Dudley S. French, the grantee, was weak in body and mind, and, for a portion of the time, could scarcely dress himself. In his deed to Stone, the consideration expressed was two thousand dollars, but the true consideration was only eight hundred dollars, and the actual value of the land was about three thousand dollars. Stone did not know that there was any defect in the title of Dudley S. French, from whom he obtained title, and who was the first grantee mentioned, and the court held that, for the purposes of the case, Stone must be considered a *bona fide* purchaser. Stone took possession of the land. The heirs of Francis B. French, the original grantor, commenced an action for partition, and the question before the court was, Was the deed from Francis B. French to Dudley S. French ever delivered, so as to make it a valid deed? The court held that the deed was not delivered; that it did not convey any title, interest, or estate, and that it was not merely voidable, but it was absolutely void: *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237. In the course of its opinion the court said: "This is unlike a case where a deed is only voidable, and a *bona fide* purchaser obtains title from the holder of the same without any notice of its infirmity. In such a case, he may obtain a good title; but, where the deed is absolutely void, he cannot. It seems to be admitted that if the deed were forged, no person could obtain any title under it, however innocent he might be; but a forged deed is no

daughter having died, the grantor filed a bill to have the deed set aside, but the court decided that the deed could not be set aside, in the failure of proof of any mistake or error in its execution, and that the original intention of the grantor had to be effectuated; while he was entitled to the use of the land in the same manner as he would have been had he reserved a life estate, yet, upon his death, the deed would take effect, and, by relation back, would vest a title in the grantee to which her heirs at law would succeed.¹

more void than this deed. Both, in this respect, are precisely alike; both are equally void, and neither the record of a forged deed, nor the record of an absolutely void deed, can be invoked to support or bolster up a disputed title; for the record is worth no more than the original deed itself. It is only instruments that have some validity, and that may, in some manner, affect real estate, that can be recorded legally. There is no statute authorizing the recording of a void instrument, and it is an error to suppose that the statutes can have the effect of making valid an absolutely void instrument by permitting the void instrument to be recorded. The instrument is still void, although recorded. The record can give it no validity. As tending to support the view that a purchaser of real estate from a person holding under a void recorded deed, although, in fact, a *bona fide* purchaser, cannot obtain a good or valid title, or, indeed, any title, we refer to the following authorities: *Everts v. Agnes*, 6 Wis. 453; *Tisher v. Beckwith*, 30 Wis. 55; 11 Am. Rep. 546; *Chipman v. Tucker*, 38 Wis. 43; 20 Am. Rep. 1; *Van Amringe v. Morton*, 4 Whart. 382; 34 Am. Dec. 517; *Smith v. South Royalton Bank*, 32 Vt. 341; 76 Am. Dec. 179; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *Berry v. Anderson*, 22 Ind. 37, 40. The case of *Lewis v. Kirk*, 28 Kan. 497, 505, 42 Am. Rep. 173, has no reference to void deeds, or to the record of void deeds. A deed not delivered at all is a very different thing from a deed actually delivered, even though the delivery of the same may have been procured through fraud; and a deed not delivered, but wrongfully in the hands of the apparent grantee, without fault or negligence on the part of the owner of the land, is unlike a deed not delivered, but which, through the fault or negligence of the owner, has been permitted to get into the hands of the apparent grantee. In the present case the deed was never delivered, and was not permitted to get into the hands of Dudley S. French, the apparent grantee, while Francis B. French was the owner of the land; but after Francis B. French died, and after the title to the land had passed from him to his heirs, the deed did get into the hands of Dudley S. French, the apparent grantee, but not through any fault or negligence on the part of the heirs, who were then the owners of the land": *Stone v. French*, 37 Kan. 145; 1 Am St. Rep. 237.

¹ *Stone v. Duvall*, 77 Ill. 475. Says Mr. Justice Walker, delivering

§ 281. **Instances.**—A grantor executed deeds in which certain of his children were named as grantees, and delivered them to a third person, directing the latter, in case he, the grantor, should die without making a will, to deliver the deeds to the children named therein as grantees. Before a will was prepared the grantor died, and the person in whose custody the deeds were placed delivered them to the children. It was decided that the deeds were valid and took effect from the first delivery.¹ Where a father executed a deed in favor of his son, and placed the deed in the hands of a third person with instructions to deliver it after the grantor's death, but not before that time, unless both parties called for it, and the deed on the father's death having been delivered conformably to his instructions, it was held to be valid.² Further illustrating the principle that a delivery of this kind is good, is a case where a grantor signed and sealed a deed with his grandson as grantee, and delivered it to the person who drew the deed, instructing him to retain it during the grantor's life, and in the event of his death to deliver it to some person to keep for the grantee. On the death of the grantor the custodian of the deed went before

the opinion of the court: "To cancel the deed would be to permit Duvall to change his mind, and to defeat his act deliberately done after consultation and advice taken, and done in accordance with his previously expressed purpose to convey to Mrs. Stone. It would be clearly wrong to abrogate the deed unless it clearly appeared that an estate less than a fee, and such an estate as terminated with her life or previous thereto, was intended to be conveyed, but was not by reason of a mistake." In *Sneathen v. Sneathen*, 104 Mo. 209, 24 Am. St. Rep. 326, Mr. Justice Black, in delivering the opinion of the court, said: "A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery; for the delivery takes effect by relation as of the date when first made to the third person. In such cases it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect, and pass title as a present transfer. This intention may be manifested by acts or by words, or by both words and acts." See, also, *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671; *Bury v. Young*, 98 Cal. 446; 35 Am. St. Rep. 186; *Henson v. Bailey*, 73 Iowa, 544; 5 Am. St. Rep. 700.

¹ *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375.

² *Tooley v. Dibble*, 2 Hill, 641.

an officer for the purpose of proving its execution as a subscribing witness, and left it with such officer for the grantee. The court held that the deed came into the hands of the grantee in the mode assigned by the grantor and operated as an effectual transfer of title.¹ So where a person in consideration of love and affection executed a deed to his children, and placed it in the hands of the husband of one of the children, with instructions to give it to some one to keep until the grantor's death and then to have it recorded, and the husband of the child in accordance with these instructions gave the deed to the grantor's wife, and after the death of the grantor it was recorded, the delivery was held to have been valid, notwithstanding the fact that the grantor had a few days after the execution of the deed expressed himself as dissatisfied with the transaction, and had declared that there was no delivery of the deed.² When a deed is delivered to a third person to be delivered to the grantee on the grantor's death, the title passes as of the time of the first delivery.³

§ 281a. Grantor's acts and declarations after delivery.—The grantor's acts and declarations made or done in his own interest several months subsequently to his delivery of the deed, are not admissible in evidence as showing his intent in delivering the deed. Nor can the subsequent execution of other deeds, purporting to convey the same property, be considered in his favor upon the question of his intention to make a valid delivery.⁴ The deed must pass beyond the control of the grantor, but this question is one of intention, to be determined as a fact by a consideration of all the surrounding circumstances.⁵ Evidence cannot be received as to what the person with whom the deed is deposited would have done

¹ Goodell v. Pierce, 2 Hill, 659.

² Squires v. Summers, 85 Ind. 252.

³ Ball v. Foreman, 37 Ohio St. 132.

⁴ Bury v. Young, 98 Cal. 446; 35 Am. St. Rep. 146. See, also, § 284 a, *post*.

⁵ Bury v. Young, *supra*.

if the deed had, after its delivery to him, been called for by the grantor.¹ Where the circumstances are entirely consistent with the grantor's right of control over the deed during his life, and do not show that he has parted with power over it, the deed is ineffectual, although the grantor leaves it in the custody of an agent with an instruction to deliver it to the grantee only in case of the death of the grantor, and although the agent delivers it as instructed.² It was claimed by the defendants in a suit that the grantor had delivered the deed to the attorney who drew it with instructions to deliver it to the grantee, and on the trial they called the attorney to show this fact and to show that he acted as a mere scrivener in drafting the deed. The lower court excluded this evidence on the ground that it was a privileged communication, but on appeal the court held that there existed no such professional relations between the attorney and the grantor as required the evidence to be excluded, but even if such relation did exist, the evidence was not prohibited because the communication was not made in professional confidence, but with the intent on the grantor's part that it should be transmitted to another.³

§ 282. Delivery with a right to recall the deed.—

While there is some conflict of opinion upon the question, it is ruled by the weight of authority that where a deed is deposited with a third person, to be delivered to the grantee upon the death of the grantor if it be not previously recalled, the grantor reserving the right to recall the deed at any time, the delivery is not effectual.⁴ "So

¹ *Dean v. Parker*, 88 Cal. 284.

² *Weisinger v. Cock*, 67 Miss. 511; 19 Am. St. Rep. 320. Said the court: "Mr. Stone evidently thought that he might dispose of his estate by deed, executed according to the forms of law, of which he remained in possession and control, and which was to be operative only on his death. In this he was mistaken."

³ *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578.

⁴ *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; *Stinson v. Anderson*, 96 Ill. 373; *Brown v. Brown*, 66 Me. 316; *Cook v. Brown*, 34 N. H. 460; *Bailey v. Bailey*, 7 Jones (N. C.), 44; *Williams v. Schatz*, 42

long as a deed," says Eastman, J., "is within the control and subject to the authority of the grantor, there is no delivery. And whether in the hands of a third person or in the desk of the grantor, is immaterial, since in either case he can destroy it at his pleasure. To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then, the instrument passes nothing; it is merely ambulatory and gives no title. It is nothing more than a will defectively executed, and is void under the statute. . . . There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. The depositary must have had such a dominion over the deed during the lifetime of the grantor as the latter could not interfere with, in order to have any control over it after his decease."¹ Where a

Ohio St. 47; *Pennington v. Pennington*, 75 Mich. 600; *Benneson v. Aiken*, 102 Ill. 284; 40 Am. Rep. 592; *McLaughlin v. McManigle*, 63 Tex. 553; *Shurtleff v. Francis*, 118 Mass. 154; *Jones v. Loveless*, 99 Ind. 317; *Davis v. Williams*, 57 Miss. 843; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Miller v. Lullman*, 81 Mo. 311; *Patterson v. Snell*, 67 Me. 559; *Goodlett v. Kelly*, 74 Ala. 213; *Otto v. Doty*, 61 Iowa, 23; *Brown v. Brown*, 66 Me. 316; *Huey v. Huey*, 65 Mo. 689; *Miller v. Physick*, 24 Ark. 244. See, also, *Anderson v. Anderson*, 126 Ind. 62; *Allen v. De Groodt*, 105 Mo. 442; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237; *McElroy v. Hiner*, 133 Ill. 156; *Miller v. Murfield*, 79 Iowa, 64.

¹ In *Cook v. Brown*, 34 N. H. 460, 475, 476. In this case, the earlier case of *Shed v. Shed*, 3 N. H. 432, where it was held under similar circumstances that a delivery was effectuated, was overruled. The decision in *Cook v. Brown* has been reaffirmed in *Johnson v. Farley*, 45 N. H. 505, 510; *Bank v. Webster*, 44 N. H. 264; *Baker v. Haskell*, 47 N. H. 479; 93 Am. Dec. 455. In the last case, Smith, J., says: "Since the decision in *Cook v. Brown*, 34 N. H. 460, overruling *Shed v. Shed*, 3 N. H. 432, it must be regarded as the established doctrine of this state, that placing a deed in the hands of a third person is not a good delivery, unless the grantor parts with his dominion over the deed. If the grantor continues till his death to have the right to recall the deed from the depositary,

deed was placed in the hands of a third person with instructions to have it recorded, and to deliver it to the grantee in case of the grantor's death, but to retain it subject to the order of the grantor until his death, and the depository having held the deed until the death of the grantor, then recorded it and transferred it to the grantee, it was held in accordance with these views that the deed never took effect from the absence of a valid delivery during the grantor's lifetime.¹ A mother, who at the time was

there is no delivery." In that case, the following is given as the testimony of the witness as to the delivery of the deed: "When he first introduced the subject of this deed, he said that his son, the defendant, who had recently got married, had said to him that he felt as if he ought to make some arrangement of his property, so that he might know what he was to have. He said, 'he is my only son, and bears my name, and I always meant to do well by him, but I don't know how he will use the property. Here is a writing in his favor. It is for him, but I don't want him to have it in his hands just now; I want you to take it and keep it in your possession till a proper time to produce it. If I keep it in my hands, I don't know who will get hold of it.' That is pretty much all he said on that subject. He made a few remarks in respect to three of his children. He said he had assisted them. He spoke in particular of Mr. Thompson. He said he had given him considerable, but it was of no use, and that he might say about the same of Nutting and Jackson. Thompson, Nutting, and Jackson had married three of his daughters. I carried the writing home and put it in my desk. I did not know what the contents were, and he did not tell me. I kept it till a short time after his death. I kept the paper till Mr. Haskell died. When I heard of his death I thought of this paper. I then inclosed it in an envelope and sent it to Jas. Haskell, Jr., the defendant."

¹ *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592. See, also, *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Jackson v. Phipps*, 12 Johns. 421; *Jackson v. Dunlap*, 1 Johns. Cas. 114; 1 Am. Dec. 100; *Baldwin v. Maultsby*, 5 Ired. 505; *Hale v. Joslin*, 134 Mass. 310. In *Prutsman v. Baker*, *supra*, Chief Justice Dixon, in delivering the opinion of the court, said: "To constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed. To do this he must part with the possession of the deed, and all right and authority to control it, either finally and forever, as where it is given over to the grantee himself or to some person for him, which is called an absolute delivery; or otherwise he must part with all *present* or temporary right of possession and control, until the happening of some future event, or the performance of some future condition, upon the happening or not, or performance, or nonperformance of which his right of possession may return and his dominion and power over the deed be restored, in which case the delivery is said to be contingent or con-

extremely ill and expected to die, signed and acknowledged two deeds in favor of her daughters, and delivered them to her physician, with directions to deliver the deeds after her death, and in doing so said: "If I recover from my present sickness, I intend to retain the right to control the property myself as long as I live." Having recovered, she subsequently received back the deeds and lived for a period of nearly five years afterward. One of the grantees obtained possession of the deed in her favor after the death of the grantor, but it was held that the deed was valueless for the want of a delivery.¹ A grantor had duly executed and acknowl-

ditional. An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession, and of the power and control over the deed by the grantor for the benefit of the grantee, *at the time of delivery*." It has been held that a court of equity has power to set aside a deed made under a mutual mistake of fact, under the erroneous impression of the grantor's speedy death, and the mistaken belief that the deed could be revoked by the grantor any time during his life: *Houghton v. Houghton*, 34 Hun, 212. And see *Meach v. Meach*, 24 Vt. 591; *Garnsey v. Mundy*, 24 N. J. Eq. (9 Greene, C. E.) 243, 246; *Forshaw v. Welsby*, 30 Beav. 243; *Wallaston v. Tribe*, Law R. 9 Eq. 44.

¹ *Jacobs v. Alexander*, 19 Barb. 243. Marvin, P. J., referring to a number of cases where deeds had been delivered to take effect upon the grantor's death, says: "It will be noticed that in all the above cases no control was retained by the grantor over the delivery of the deed to the grantee. An event or condition was specified upon which the delivery was to depend, and when that event happened, or the condition was performed, the deed was delivered. And I think the authorities show that when the event specified is the death of the grantor, and the deed is delivered after the death, the grantee is deemed to take title by relation at the time the deed was delivered by the grantor to the third person. In the case we are considering, the delivery to Dr. Thomas was qualified. The grantor was aged and very ill, and expected to die of her then sickness. Under these circumstances she caused the deeds to be prepared, signed them, acknowledged them, and handed them to Thomas, instructing him to deliver them to the grantees respectively, after her death, adding, at the same time, 'If I recover from my present sickness, I intend to retain the right to control the property myself as long as I live.' She recovered and lived nearly five years, and soon after her recovery she received back the deeds from Dr. Thomas, and never delivered the deed to Mary Anguish; but Mary obtained possession of it after her death. It seems to me that this case is clearly distinguishable in principle from the cases cited by the plaintiff's counsel. When she author-

edged a deed, but with the grantee's consent was to retain it until the payment of the consideration. Before payment was made, the grantor died, leaving a will in which he made a devise of the same land described in the deed. The deed was found among his papers, and it was held that the deed had never actually been delivered to the grantee, nor accepted by him, and hence did not transfer the land.¹ A father, after executing a deed in favor of his son, directed the scrivener to have it recorded, and then to retain it until it should be called for. The son never knew of these facts, and, after his death, the father reclaimed and canceled the deed. The deed, it was held, had never been delivered, and therefore the father was adjudged to be entitled to the premises as against the heirs of the son.²

§ 283. **This rule not universally adopted.** — While it seems to accord with legal reasoning that a deed should not become effective where a grantor reserves the right to recall the same prior to his death, yet this view has not been universally adopted. In an early case in Connecticut, a grantor who had signed, sealed, and acknowledged two deeds took them up, in the absence of the grantee, and delivered them to a third person, saying: "Take these deeds and keep them; if I never call for them, deliver over one to Pamela and the other to Noble, after my death; if I call for them, deliver them to me." The grantor never called for the deeds, and on his death, a

ized Thomas to deliver the deeds after her death to the grantees, she had reference to her death from her then sickness, as is clear from her avowed intent, in case she should recover, to retain the right to control the property. At any rate she retained the right, in case she recovered, to control the property as long as she lived, and this involved the right to recall the deeds and make any other disposition of the property by will or otherwise, and she exercised this right by recalling the deeds, and taking them into her own possession and under her own control. The grantee, Mary Anguish, had no vested interest in and no control over the deed."

¹ *Jackson v. Dunlap*, 1 Johns. Cas. 114; 1 Am. Dec. 100.

² *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146. And see *Stinson v. Anderson*, 96 Ill. 373.

short time after their execution, they were delivered to the grantees, in accordance with the grantor's directions. The court held that the deeds were valid, and took effect from the first delivery.¹ A decision of a similar character was also made in Vermont, in a case where a debtor, who was largely indebted and insolvent, executed and delivered to a third person, for the purpose of preferring certain of his *bona fide* creditors, a deed which such third person was to hold in trust, to be delivered to the grantees at the decease of the grantor, unless he should otherwise direct during his lifetime.²

¹ *Belden v. Carter*, 4 Day, 66; 4 Am. Dec. 185. Say the court: "The grantor delivered the deed to Wright, with a reservation of a power to countermand it; but this makes no difference, for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without an express reservation of that power. The case, then, stands upon the same footing as if there had been no reservation of a power to countermand the deed. It was a delivery of a writing as a deed to the use of the grantee, to take effect at the death of the grantor, deposited in the hands of a third person to hold till that event happened, and then to deliver it to the grantee. The legal operation of this delivery is, that it became the deed of the grantor presently; that Wright held it as a trustee for the use of the grantee; that the title became consummate in the grantee by the death of the grantor; and that the deed took effect, by relation, from the time of the first delivery." This decision has been recognized as an authority in several later cases in the same court: *Stewart v. Stewart*, 5 Conn. 320; *Woodward v. Camp*, 22 Conn. 461; *Jones v. Jones*, 6 Conn. 113; 16 Am. Dec. 35; *Alsop v. Swathel*, 7 Conn. 503; *Merrills v. Swift*, 18 Conn. 262; 46 Am. Dec. 315.

² *Morse v. Slason*, 13 Vt. 296. The court say: "It has been urged, too, and with no little plausibility, that one involved in debt to a large amount and largely insolvent, ought not to be allowed to prefer creditors by a deed or other instrument, which is under his control during his whole life, and only takes effect at the very moment when a lien upon his property attaches in favor of 'all his creditors.' But the numerous cases decided upon this subject, many of which have been referred to in the argument, all show, that where a deed is delivered in trust for the grantee, to take effect at the grantor's death, unless he shall otherwise direct in his lifetime, and he dies without giving any further direction, the deed does, at the death of the grantor, take effect as his deed, from the *first delivery*. From this view of the case there does not seem any very valid objection to this mode of preferring creditors, which will justify the court in distinguishing it from the ordinary case of preferring creditors. It is always an invidious, and sometimes an unjust distinction, but one which the law of this state does not prohibit or control.

§ 283 a. Creditors not injured by undelivered deed.

A deed not delivered until after the death of the grantor is no obstacle to his creditors enforcing their debts in the usual course of administration, and, therefore, it will not be canceled in equity at the suit of an administrator. In such a case the decedent dies seised of the land, and the rights of the creditors cannot be affected by the subsequent delivery of the deed.¹ Generally, under the statutes providing for the administration of estates the rights of creditors against the real estate of deceased persons, attaches to the land as a statutory lien immediately upon the owner's death, and their rights cannot be impaired by any conveyance delivered subsequently.² The executors of a deceased person brought an action to set aside certain conveyances made by their testator, and entered into a contract with an attorney, agreeing to give him as compensation for his services, in addition to any costs, one-half of any recovery, and for the purpose of effectuating this agreement assigned to him one-half of any recovery. The executors had no power, it was held, to make the agreement, and no lien was created by it upon the estate.³

§ 284. Saving expenses of administration.—Whether a deed passes a title or not must be determined by its legal effect. If it has been executed and delivered its effect is determined by its language. When so executed and delivered its legal effect as to the passing of the title is not altered by the fact that one object of the transaction was to save the expense and trouble of administration upon the grantor's estate after his death. And where a grantor executed a deed for this purpose to his wife, the

And we think this case is not, in principle, distinguishable from the ordinary cases. There is nothing here indicating any want of good faith, or any attempt at disguise or dissimulation": And see *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147; *Hoffman v. Hoffmann*, 81 Iowa, 292.

¹ *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578.

² *Platt v. Platt*, 105 N. Y. 488.

³ *Platt v. Platt*, *supra*.

fact that she placed the deed after delivery where her husband equally with herself could have access to it, does not change its legal effect as a conveyance.¹ A deed which conveys an estate to a person for life, and, on the latter's death, to her children, but reserving a life estate to the grantor, is valid and operative.²

§ 284 a. **Formal expressions of grantor.**—In a case where it is doubtful whether a deed has been delivered or not, the formal expression of the grantor that the deed has been delivered, where he fully understands the import of that term, may have a controlling effect on the question of delivery. A deed from a husband to his wife, reserving to him a life estate, was found after his death in his office safe, in an envelope containing other papers belonging to his wife. He declared in a will made shortly before his death that he had executed and delivered such a conveyance to his wife. The grantor was a lawyer of experience, and the court held that he should be assumed to know the force and meaning of the terms that he used in speaking of that conveyance, that the language should be given its natural force and meaning, and that this formal declaration in connection with the relationship of the parties, the way in which the wife's valuable papers were kept, and the place in which the deed was deposited and found, established with sufficient certainty that the deed described in the will was properly delivered and vested the wife with the title.³ Although a grantor retains possession of a trust deed, in which he was nominally one of the trustees, intended as a settlement for the benefit of his family, yet where he had formally acknowledged and recorded it, and recognized it in a will, and the other trustee was present at the time of execution and consented to act, the deed is sufficiently executed and delivered.⁴ Where, however, land has been

¹ *Le Saulnier v. Loew*, 53 Wis. 207.

² *Savage v. Lee*, 90 N. C. 320; 47 Am. Rep. 523.

³ *Toms v. Owen*, 52 Fed. Rep. 417.

⁴ *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232.

conveyed by a deed which divests the grantor of his title; he cannot alter or explain the conveyance in a subsequent will, as the property is no longer his.¹

§ 285. **Acceptance by the grantee.** — Though a grantor may execute a deed and tender it to the grantee, he still retains the title unless the grantee accept the deed.² If the rights of a creditor of the grantor intervene before an acceptance by the grantee, they will be protected against the claims of the grantee or any one deriving title under him.³ "It is essential to the operative force and validity of a deed, if not actually delivered to the grantee, or his agent authorized to receive it, to prove notice to him of its execution, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. The presumption that a party will accept a deed because it is beneficial to him, it is said will never be carried so far as to consider him as having accepted it."⁴ An acceptance may in some cases, to be

¹ *Purcell v. Purcell*, Riley Eq. (S. C.) 282. See, also, § 281, a, *ante*.

² *Cooper v. Jackson*, 4 Wis. 537; *Comer v. Baldwin*, 16 Minn. 172; *Woodbury v. Fisher*, 20 Ind. 389; 83 Am. Dec. 325; *Jefferson County Building Assn. v. Heil*, 81 Ky. 513; *Welch v. Cooper*, 12 Wis. 243; *Vaughan v. Goodman*, 94 Ind. 191; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327; *Moore v. Flynn*, 135 Ill. 74; 25 N. E. Rep. 844; *Weber v. Chuslen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Dale v. Lincoln*, 62 Ill. 22; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267; 35 Am. Rep. 166; *Wiggins v. Lusk*, 12 Ill. 132; *Kingsbury v. Burnside*, 58 Ill. 324; 11 Am. Rep. 67; *Cline v. Jones*, 111 Ill. 563; *Reed v. Douthit*, 62 Ill. 348; *Rountree v. Smith*, 152 Ill. 493; 38 N. E. Rep. 680; *Bryan v. Wash*, 7 Ill. 557; *Masterson v. Cheek*, 23 Ill. 72; *Gorman v. Gorman*, 98 Ill. 361; *Lancaster v. Blaney*, 140 Ill. 203; 29 N. E. Rep. 870; *Benneson v. Aiken*, 102 Ill. 284; 40 Am. Rep. 592; *Parker v. Parker*, 1 Gray, 409; *Parker v. Hill*, 8 Met. 447; *Hawkes v. Pike*, 105 Mass. 560; 7 Am. Rep. 554; *Tuttle v. Turner*, 28 Tex. 759; *Beardsley v. Hilson*, 94 Ga. 50; 20 S. E. Rep. 272; *Rogers v. Carey*, 47 Mo. 232; 4 Am. Rep. 322; *Rettmaster v. Brisbane*, 19 Col. 371; 35 Pac. Rep. 376; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *Watson v. Hillman*, 57 Mich. 607; *Ireland v. Geraghty*, 15 Fed. Rep. 35.

³ *Commonwealth v. Jackson*, 10 Bush, 418; *Welch v. Sackett*, 12 Wis. 243.

⁴ *Tuttle v. Turner*, 28 Tex. 759, 773, per Coke, J. See, also, 4 Kent's Com. 454; *Hulick v. Scovil*, 4 Gilm. 159. The direction by the grantee of a sale of the property shows an acceptance of the deed: *Niland v.*

noticed in a subsequent section, be presumed, and this presumption may arise from the retention of the deed by the grantee. But where an agreement is made that a grantor is to convey the land to the purchaser by a deed containing certain special provisions, and a deed is made and handed to the purchaser, which conveys the land to another person, the purchaser taking it without an examination of its contents, understanding and believing that it is a deed which vests the title in him, and retains it in such belief until he ascertains the truth, may return the deed to the vendor and require a conveyance in accordance with the agreement. Acceptance by the grantee being essential, no valid and effectual delivery has been made in such a case.¹ There is a sufficient delivery of a deed, and it passes

Murphy, 73 Wis. 326. A deed in favor of a married woman was delivered to her husband in trust for her benefit by the grantor, who requested that it should be kept secret until her death. The grantee was in the house when the deed was prepared and executed, and was present at a conversation occurring shortly before, at which time the grantor announced his intention to convey the property to her. The court held that the circumstances justified the presumption that the deed was delivered with the intent that it should operate as a present conveyance, and that it was accepted by the plaintiff, and this having been found by the jury, it became effectual as a deed: *Crain v. Wright*, 114 N. Y. 307.

¹ *Fonda v. Sage*, 46 Barb. 109. See, also, *Foster v. Beardsley Scythe Co.*, 47 Barb. 505, 519; *Bell v. Farmers' Bank*, 11 Bush, 34; 21 Am. Rep. 205; *Wilsey v. Dennis*, 44 Barb. 359; *Young v. Guilbeau*, 3 Wall. 636, 641; *Jackson v. Phipps*, 12 Johns. 422; *Townsen v. Tickell*, 3 Barn. & Adol. 36. In *Fonda v. Sage*, *supra*, Johnson, J., delivering the opinion of the court, said: "To constitute a delivery of a deed so that it shall become effectual to transfer title to real estate from one to another, there must be an acceptance by the person to whom it is made. Acceptance by the grantee is an essential part of a delivery in law. When a deed or other instrument is handed over by the maker to the other party, and retained by such other party, and nothing further is said, the law presumes that the instrument is made according to the agreement, and that the party to whom it is thus handed over accepts it as a delivery in fulfillment of the agreement between them. But it is not every mere handing over, and retention for a greater or less period of time, which will constitute a full and effectual delivery of an instrument. If it is taken by the grantee or other party merely for the purpose of examination, to see whether it is in accordance with the agreement, it is no delivery,

title if it is left unconditionally with a third person for the use of a lunatic grantee who is not under guardianship, and is received by the grantee under circumstances that indicated an acceptance.¹ Evidence of the acts and declarations of the grantee respecting the deed while it was in his actual possession, are admissible for the purpose of determining whether the deed was accepted or not.²

§ 286. How far acceptance may be presumed in favor of infants.—The rule with reference to infants and persons under a disability, is that they are presumed to

unless the party concludes to retain it after such examination. And so I apprehend where a party makes a purchase of land, and the agreement is that the vendor is to convey it to the purchaser by a deed with some special provision in it, and a deed is made and handed over to such purchaser, which conveys the land to another person, and the purchaser receives it without any examination of its contents, understanding and believing that it is a deed made to him, and which vests the title in him, and retains it in that belief, until he discovers that it is not such an instrument as he was to have, and does not give him the land which he had purchased and paid for, he may return it to the vendor and require one to be made in accordance with the agreement. No valid and effectual delivery has been made in such case. There has been no meeting of minds, which is as essential in this as in any other part of the agreement. Upon the discovery of the mistake or error within a reasonable time, and before any other rights have intervened, founded upon the instrument as made and thus retained, the party receiving it may refuse to retain it, and may return it and demand one in accordance with the agreement. The rejection in such a case, where the mistake or misapprehension under which the instrument had been received was genuine, and the delay in the discovery of the mistake or error excusable, would relate back to the original delivery or handing over of the instrument, and constitute a refusal to accept it at that time. There being no acceptance, no title has passed, and a new instrument conveying according to the agreement would transfer the original title of the vendor."

¹ *Campbell v. Kuhn*, 45 Mich. 513; 40 Am. Rep. 479. But there is no delivery where the grantee, on receipt of the deed, repudiates it and returns it to the grantor: *Beardsley v. Hilson*, 94 Ga. 50. A grantee, by accepting a deed, makes it his deed as well as that of the grantor: *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

² *Kidder v. Stevens*, 60 Cal. 414. If the grantee accepts a deed-poll in which certain duties are reserved expressly to be performed by him, assumpsit will lie for their nonperformance: *Glade v. Schmidt*, 15 Bradw. (Ill.) 51.

accept conveyances made for their benefit.¹ "The principle being admitted," says Mr. Justice Breese, "that an infant of tender years can take by deed, not having at the same time discretion to accept or refuse, and dying before that period arrives, and the grantor having performed every act he could perform to pass the title to the infant, and it being for his benefit, it is fair to presume he assented to it. The grantor in this case must be regarded as to his subsequent possession of the deed, as the mere custodian or trustee for his son. The law presumes much more in favor of the delivery of deeds in the case of voluntary settlements, especially when made to infants, than it does between parties of full age in ordinary cases of bargain and sale."² An absolute deed from a father to a minor child, beneficial to the latter, is, when voluntarily

¹ *Compton v. White*, 86 Mich. 33; 48 N. W. Rep. 635; *Campbell v. Kuhn*, 45 Mich. 513; 40 Am. Rep. 479; *Davis v. Garrett*, 91 Tenn. 147; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 63; *Rivard v. Walker*, 39 Ill. 413; *Standiford v. Standiford*, 97 Mo. 231; *Crowder v. Searcy*, 103 Mo. 97; *Burk v. Adams*, 80 Mo. 504; 50 Am. Rep. 510; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Tobin v. Bass*, 85 Mo. 654; 55 Am. Rep. 392; *Hall v. Hall*, 107 Mo. 101; *Eastham v. Powell*, 51 Ark. 530; *Palmer v. Palmer*, 62 Iowa, 204; *Newton v. Bealer*, 41 Iowa, 334; *Byington v. Moore*, 62 Iowa, 470; *Cecil v. Beaver*, 28 Iowa, 241; 4 Am. Rep. 174; *Vaughan v. Godman*, 94 Ind. 191; *Spencer v. Carr*, 45 N. Y. 406; 6 Am. Rep. 112; *Ireland v. Geraghty*, 15 Fed. Rep. 35.

² In *Masterson v. Cheek*, 23 Ill. 72, 77. See, also, *Byington v. Moore*, 62 Iowa, 470. In *Bryan v. Wash*, 2 Gilm. page 568, it is said: "It must be remembered that the law presumes much more in favor of the delivery of deeds in case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale. The same degree of formality is never required, on account of the great degree of confidence which the parties are presumed to have in each other, and the liability of the grantee, frequently, to take care of his own interests. The presumption of law is in favor of the delivery, and the burden of proof is on the grantor to show clearly that there was no delivery." The law will presume that where the grantee is an infant, that he accepts a deed beneficial to him, and hence it is not essential to show his knowledge thereof: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326. See, also, *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75; *Winterbottom v. Pattison*, 152 Ill. 334; *Cline v. Jones*, 111 Ill. 563; *Bryan v. Wash*, 7 Ill. 557; *Douglas v. West*, 140 Ill. 455; *Rivard v. Walker*, 39 Ill. 413; *Haenni v. Bleisch*, 146 Ill. 262; *Otis v. Beckwith*, 49 Ill. 121;

delivered by the father, sufficiently delivered.¹ A person, for the purpose of preventing the squandering of his property by his wife, executed a deed in favor of his children, and had the instrument recorded. The wife afterward obtained a divorce, and thereupon the grantor filed a bill to set aside the deed made to the children, alleging as grounds for relief that there had been no delivery to the grantees, and that the motives which led to the execution of the deeds no longer existed. But it was held that as the grantor intended to divest himself of the title so as to place it beyond the reach of his wife, which result would not have been accomplished unless the deed took immediate effect, his acts would, in behalf of infant grantees, be regarded as an absolute delivery.² The legal presumption where a father has purchased land, paying for it himself but causing the title to be taken in the name of the children, is, that these acts constitute an advancement to the children, and not a trust in favor of the father. Clear and satisfactory evidence, however, will overcome the presumption that a trust and not an advancement was intended.³

Bunn v. Winthrop, 1 Johns. Ch. 329; *Urann v. Coates*, 109 Mass. 581; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Williams v. Williams*, 148 Ill. 426.

¹ *Palmer v. Palmer*, 62 Iowa, 204. The presumption arising from the registration of a deed when the grantees are minors and members of the grantor's family is not overcome by the fact of the grantor's possession of the deed: *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345.

² *Rivard v. Walker*, 39 Ill. 413. See *Spencer v. Carr*, 45 N. Y. 407; 6 Am. Rep. 112.

³ *Cecil v. Beaver*, 28 Iowa, 241; 4 Am. Rep. 174. In the course of the opinion, Chief Justice Dillon said: "Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby. In such case actual manual delivery and a formal acceptance are not necessary. Of the effect of such a deed, and by what kind of evidence a trust can be established, no further observations are necessary: *Robinson v. Gould*, 26 Iowa, 89; *Masterson v. Cheek*, 23 Ill. 72; *Mitchell v. Ryan*, 3 Ohio St. 377; *Foley v. Howard*, 8 Iowa, 56; 3 Wash. Real Prop. (3d ed.) 261, top page, and cases cited." In a complaint to quiet title to land, it was alleged that a deed was not delivered, but was made by a father to his minor child to avoid an unjust suit, and that it was taken

§ 287. **As to presumption of acceptance by adults.**—We have noticed in the preceding section the rules applicable to delivery and acceptance of deeds when made in favor of infants. There is, however, in this question, of how far acceptance may be presumed in favor of adults, a diversity among the decisions. In some cases it is held that the assent of the grantee to the deed, if it be beneficial to him, will be presumed.¹ This view of the question finds forcible expression in a case in Ohio, in which Mr. Chief Justice Thurman says: "It is true that judges have said with more solemnity than I think the occasion warranted, that no one can have an estate thrust upon him against his will, and that, consequently, a delivery of a deed to a stranger, for the use of the grantee, is of no effect unless assented to by the latter. How much weight this argument is entitled to, may be judged of by the fact that estates are every day thrust upon people by last will and testament; and it certainly would sound somewhat

by him to the recorder's office without her knowledge, and subsequently obtained by him, and always kept with his papers. The court held that on demurrer it could not be said that as a matter of law the deed was delivered: *Vaughan v. Goodman*, 94 Ind. 191.

¹ *McLean v. Nelson*, 1 Jones (N. C.), 396; *Jones v. Swayze*, 42 N. J. L. 279; *Mallory v. Stodder*, 6 Ala. 801; *Tibbals v. Jacobs*, 31 Conn. 428; *Lady Superior v. McNamara*, 3 Barb. Ch. 375; 49 Am. Dec. 184; *Renfro v. Harrison*, 10 Mo. 411; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Brown v. Austen*, 35 Barb. 341; *Rogers v. Carey*, 47 Mo. 232; 4 Am. Rep. 322; *Bennett v. Waller*, 23 Ill. 97; *Stewart v. Reed*, 11 Ind. 92; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Diefendorf v. Diefendorf*, 132 N. Y. 100; 30 N. E. Rep. 275; *Vaughan v. Godman*, 103 Ind. 499; *Davis v. Garrett*, 91 Tenn. 147; *Henry v. Anderson*, 77 Ind. 361; *Elsberry v. Boykin*, 65 Ala. 336; *Moore v. Giles*, 49 Conn. 470; *Cecil v. Beaver*, 28 Iowa, 241; 4 Am. Rep. 174; *Ross v. Campbell*, 73 Ga. 309. In *Jackson v. Bodle*, 20 Johns. 187, *Spencer, C. J.*, says: "It is necessary to the validity of a deed that there be a grantee willing to accept it. It is a contract, a parting with the property by the grantor, and an acceptance thereof by the grantee. An acceptance will be presumed from the beneficial nature of the transaction, where the grant is not absolute. The presumption is not so strong that the grantee accepts the deed where he derives no benefit under it, but is subjected to a duty or the performance of a trust." See, also, *Camp v. Camp*, 5 Conn. 291; 13 Am. Dec. 60; *Halsey v. Whitney*, 4 Mason, 20; *Young v. Cardwell*, 6 Lea (Tenn.) 168.

novel to say that the devises were of no effect until assented to by the devisees. If a father should die testate, devising an estate to his daughter, and the latter should afterward die without a knowledge of the will, it would hardly be contended that the devise became void for want of acceptance, and that the heirs of the devisee must lose the estate. Neither will it be denied that equitable estates are every day thrust upon people by deeds, or assignments made in trust for their benefit, nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the statute of descent, and we begin to estimate the value of the argument that a man shall not be made a property holder against his will, and that courts should be astute to shield him from such a wrong. It is certainly true, as a general rule, that acceptance by the grantee is necessary to constitute a good delivery, for a man may refuse even a gift. But that such acceptance need not be manual is equally true, and it is also certain that simple assent to the conveyance, given even before its execution, is a sufficient acceptance. . . . But the cases go still further, and upon the soundest reasons hold that where a grant is plainly beneficial to the grantee, his acceptance of it is to be presumed in the absence of proof to the contrary. It is argued, however, that this is only a rule of evidence, and that where the proofs show that the grantee has never had any knowledge of the conveyance the presumption is rebutted. If this argument were limited to cases in which an acceptance of the grant would impose some obligation upon the grantee, I am not prepared to say that I would object to it, although the obligation might fall far short of the value of the grant. But where the grant is a pure, unqualified gift, I think the true rule is that the presumption of acceptance can be rebutted only by proof of dissent; and it matters not that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he

did know of and *rejected* it. If this is not so, how can a deed be made to an infant of such tender years as to be incapable of assent? Is it the law, that if a father make a deed or gift to his infant child, and deliver it to the recorder to be recorded for the use of the child, and to vest the estate in it, the deed is of no effect until the child grows to years of intelligence and gives its consent? May the estate, in the mean time, be taken for the subsequently contracted debts of the father, or will the statute of limitations begin to run in favor of a trespasser upon the idea that the title remains in the adult? Or will the conveyance entirely fail if either grantor or grantee die before the latter assent? I do not so understand the law. In such a case, the acceptance of the grantee is a presumption of law, arising from the beneficial nature of the grant, and not a mere presumption of an actual acceptance. And for the same reason that the law makes the presumption, it does not allow it to be disproved by anything short of actual dissent.”¹

§ 288. **Contrary views.**—Mr. Washburn, in his treatise on Real Property, dissents from the opinion that acceptance may be inferred from the beneficial nature alone of the deed. He says: “But although several of the cases seem to sustain the doctrine that a delivery of a deed to a stranger for the grantee, where it is obviously for his benefit, passes the title at once as an effectual delivery, the better opinion seems to be that no deed can take effect

¹ Lessee of Mitchell v. Ryan, 3 Ohio St. 377, 386. The learned judge recognizes the existence of cases holding a contrary view, saying: “I am fully aware that these views may seem opposed to many decided cases, but they are fully sustained by others that stand, in our judgment, upon a more solid foundation of reason. The strictness of the ancient doctrine, in respect to the delivery of deeds, has gradually worn away until a doctrine more consistent with reason and the habits of the present generation now prevails.” See also sustaining the doctrine that acceptance is presumed, Halluck v. Bush, 2 Root, 26; 1 Am. Dec. 60; Hedge v. Drew, 12 Pick. 141; 22 Am. Dec. 416; Brown v. Austen, 35 Barb. 341; Read v. Robinson, 6 Watts & S. 329; Peavey v. Tilton, 18 N. H. 151; 45 Am. Dec. 365; Moore v. Giles, 49 Conn. 570; Elsberry v. Boykin, 65 Ala. 336; Rivard v. Walker, 33 Ill. 415.

as having been delivered until such act of delivery has been assented to by the grantee, and he shall have done something equivalent to an actual acceptance of it; and moreover the act of delivery and acceptance must, from the nature of the case, be mutual and concurrent acts.”¹ Most of the cases, however, cited by Mr. Washburn in support of his assertion are cases where the grantor intended to keep control of and had not parted with power over the deed. And the view that he expresses has been directly disapproved in a late case in New Jersey, holding that the law will presume, if nothing appear to the contrary, that a man accepts what is for his benefit.² But even while assent may thus be presumed, that presumption may of course be overcome by evidence of dissent.³

§ 289. **What is the proper rule—Comments.**—The true rule would seem to be that when the grantor *has parted with all control* of the deed, its acceptance by the grantee may be presumed if it be beneficial to him. This is the doctrine that prevails in England, and has been thus expressed by Justice Bayley: “There could be no question but that delivery to a third person, for the use of the party in whose favor the deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery; the law will presume, if nothing appears to the contrary, that a man accepts what is for his benefit.”⁴ In view of the conflict among the decisions, the only safe rule that perhaps can be laid down is that enunciated in a well-considered case in Illinois, in which it is said: “In case of a delivery to a stranger without authority from the grantee, the acceptance of the grantee at the time of delivery will

¹ 3 Wash. Real Prop. (4th ed.) 292. This language is quoted with approval in *Bell v. Farmers' Bank*, 11 Bush, 34; 21 Am. Rep. 205.

² *Jones v. Swayze*, 42 N. J. L. 279.

³ *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82.

⁴ *Garnans v. Knight*, 5 Barn. & C. 671. See *Bowman v. Griffith*, 35 Neb. 361.

be presumed under the following concurring circumstances, viz: (1) That the deed be upon its face beneficial to the grantee; (2) that the grantor part entirely with all control over the deed; (3) that the grantor (except in case of an escrow), accompany delivery by a declaration, intention, or intimation that the deed is delivered for and in behalf, and to the use of the grantee; (4) that the grantee has eventually accepted the deed and claimed under it.”¹

§ 290. Registration not of itself delivery.—The registration of a deed by the grantor without the grantee’s knowledge or assent, does not of itself operate as a deliv-

¹ *Hulick v. Scovil*, 4 Gilm. 159, 176, per Thomas, J. In *Stewart v. Weed*, 11 Ind. 92, the court, per Davison, J., say: “A late writer upon the subject before us says that ‘delivery to a third person for the use of the party in whose favor the deed is made, provided the grantor parts with all control over the instrument, will make the deed effectual from the instant of such delivery; for the law will presume, if nothing appears to the contrary, that a man will accept what is for his benefit: Broom’s Com. 275, 276. This exposition seems to be correct, and we think has an evident bearing on the question under consideration, because the record shows that the deed in question was delivered unconditionally to the plaintiff, and that the grantor parted with all control over it. Still, however, the inquiry arises, Has the grantee accepted the deed? We have decided that such acceptance may be presumed from the beneficial nature of the transaction: *Guard v. Bradley*, 7 Ind. 600.” See, also, *Bennett v. Waller*, 23 Ill. 97; *Rogers v. Carey*, 47 Mo. 232; 4 Am. Rep. 322; *McLean v. Nelson*, 1 Jones (N. C.), 396; *Brown v. Austen*, 35 Barb. 341; *Ernst v. Reed*, 49 Barb. 367. In *Hulick v. Scovil*, 4 Gilm. 177, cited *supra*, the court further say: “From the fact that the grantee will probably be benefited by accepting the deed, it may reasonably be presumed that he shall do so when it shall be offered to him, or he become apprised of its existence; but until then it certainly cannot be presumed that he has done so. No case has ever gone so far as that. But in every case in which the grantee’s acceptance of a deed delivered to a stranger without authority to receive it has been presumed, the following concurrent facts have appeared with the apparently beneficial operation of the deed toward the grantee, viz: (1) That the grantee has actually accepted the deed or sought to become its beneficiary before the occurrence of the litigation involving the question of his acceptance; (2) That the grantee or some one claiming under his title has been a party to such litigation for the purpose of establishing such title. And, moreover, the deeds held good in many of the cases were voluntary deeds by parents settling property upon their minor children, and the

ery of a deed.¹ A register of deeds made out a deed which the grantor signed, sealed, and left with him for the purpose of having it recorded. The next day the grantor called upon the register, and said he did not wish the deed recorded, but as the register had partially recorded the deed, he refused to give it back until the registration was complete. After recording the deed, the officer gave it back to the grantor, who retained its possession, and under these circumstances it was held that there was no delivery of the deed to the grantee.² In another case, the

benignity of construction given to them has originated to no inconsiderable extent in the favor with which transactions of that character, when not in fraud of creditors, are always viewed."

¹ *Hawkes v. Pike*, 105 Mass. 560; 7 Am. Rep. 554; *Parker v. Hill*, 8 Met. 447; *Tharp v. Jarrell*, 66 Ind. 52; *Jones v. Bush*, 4 Har. (Del.) 1; *Hendricks v. Rasson*, 53 Ind. 575; *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Barns v. Hatch*, 3 N. H. 304; 14 Am. Dec. 369; *Samson v. Thornton*, 3 Met. 275; 37 Am. Dec. 135; *Patterson v. Snell*, 67 Me. 559; *Walsh v. Vermont Mut. Fire Ins. Co.*, 54 Vt. 351; *Berkshire etc. Ins. Co. v. Sturgis*, 13 Gray, 177; *Hadlock v. Hadlock*, 22 Ill. 384; *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606; *Bullitt v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Hawkes v. Pike*, 105 Mass. 560; 7 Am. Rep. 554; *Barnes v. Barnes*, 161 Mass. 381; 37 N. E. Rep. 370; *Commonwealth v. Cutler*, 153 Mass. 252; *Brabrook v. Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Rittmaster v. Brisbane*, 19 Col. 371; *Oxnard v. Blake*, 45 Me. 602; *McGraw v. McGraw*, 79 Me. 257; *Hall v. McNichol*, 80 Me. 209; *Vaughan v. Godman*, 94 Ind. 191; *Jones v. Loveless*, 99 Ind. 317; *Woodbury v. Fisher*, 20 Ind. 387; 83 Am. Dec. 325; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *Thompson v. Dearborn*, 107 Ill. 87; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267; 35 Am. Rep. 166; *Derry Bank v. Webster*, 44 N. H. 264; *Johnson v. Farley*, 45 N. H. 505; *Gorham v. Meacham*, 63 Vt. 231; 22 Atl. Rep. 572; *Critchfield v. Critchfield*, 24 Pa. St. 100; *Beckett v. Heston*, 49 N. J. Eq. 510; *Pennel v. Weyant*, 2 Harr. (Del.) 501; *Alexander v. De Kermel*, 81 Ky. 345; *Leppoc v. Union Bank*, 32 Md. 106; *Jefferson County Building Assn. v. Heil*, 81 Ky. 513; *Cobb v. Chase*, 54 Iowa, 253; *Deere v. Nelson*, 73 Iowa, 186; *Day v. Griffith*, 15 Iowa, 104; *Gifford v. Corrigan*, 105 N. Y. 223; *Davis v. Cross*, 14 La. 637; 52 Am. Rep. 177. The grantee by subsequently ratifying and accepting the deed cannot cut off an intervening judgment lien: *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606. Citing section 290 of text, see *Barr v. Schroeder*, 32 Cal. 610.

² *Hawkes v. Pike*, 105 Mass. 561; 7 Am. Rep. 554. The court, per Ames, J., who delivered the opinion, says: "A deed of real estate in order to take effect as a conveyance of title, must be delivered by the

parties had agreed upon a sale of a tract of land at a certain sum per rod, and a deed was made out, but as the land had not been measured, the deed was not acknowledged and delivered. Afterward, without the knowledge of the grantee, the owner sent the deed to the proper officer for registration. But the grantee was held to have no title as against a creditor of the grantor, who had attached the land before acceptance on the part of the grantee.¹ A grantor executed a deed, stating that he did so to prevent

grantor, and actually or by implication accepted as his own by the grantee: 3 Wash. Real Prop. (3d ed.), 254. No definite or specific formality is prescribed by law, but it must be the concurrent act of the two parties. It must appear that the grantor parts with the control and possession of the instrument with the intention that it shall operate immediately as a transfer of title, and that it passes into the hands, or is placed at the disposal of the grantee, or of some other person in his behalf: *Harrison v. Phillips Academy*, 12 Mass. 456; *Maynard v. Maynard*, 10 Mass. 456; 6 Am. Dec. 146; *Elmore v. Marks*, 39 Vt. 538; *Jackson v. Phipps*, 12 Johns. 418. The register of deeds may have been the person agreed upon as the agent of the grantee, and in such a case a deed left with him for record is sufficiently delivered. But registration of itself does not operate as a delivery, nor does it supersede the necessity of proof of a delivery: *Parker v. Hill*, 8 Met. 447; *Samson v. Thornton*, 3 Met. 275; 37 Am. Dec. 135. In this case there was no delivery directly to the grantee, who was in California at the date of the deed; and we see nothing in the report that shows a delivery to any person for him. The scrivener who drew up the deed at the grantor's request had no authority from the absent grantee, and did not undertake to act for or to represent him. He assumed no trust, and came under no responsibility to him. He was not requested to keep the deed for him or to send it to him. He was employed by the grantor only, and all that he was to do, or undertook to do, was in his official capacity of register to record the deed; and the only reason which he gave for not giving it up when called upon was, that the record had been begun but not finished. It was then simply a delivery to the register for the purpose of registration, which is wholly insufficient to pass any title to the grantee. There was no agent to accept the deed; no delivery to give effect to the deed as a conveyance. On the contrary, it appears from the grantor's testimony, which seems to be uncontradicted, that the delivery which he had in mind was to take the deed from the register and send it by mail to his son in California."

¹ *Samson v. Thornton*, 3 Met. 275; 37 Am. Dec. 135. See, also, *Denton v. Perry*, 5 Vt. 382; *Johnson v. Farley*, 45 N. H. 505; *Parmelee v. Simpson*, 5 Wall. 81; *Bank v. Webster*, 44 N. H. 264; *Gregory v. Walker*, 38 Ala. 26. But see *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Tompkins v. Wheeler*, 16 Peters, 119.

the land from being taken for an unjust debt, and sent it to the proper officer to have it recorded. The grantee did not know of the execution of the deed until after the death of the grantor, and under these circumstances it was held that the deed was never delivered.¹

§ 291. Delivery to recording officer for use of grantee. While, as we have seen in the preceding section, mere registration does not operate as a delivery, yet if the deed be delivered to the register for the use of the grantee, and he is made the latter's agent, either expressly or impliedly, the registration is an effectual delivery. In a case in the Supreme Court of the United States, where it was held that the placing of a deed on record, the grantee being ignorant of its execution and not having authorized or given his assent to the record, did not operate as a delivery so as to give the grantee precedence over a mortgage executed between registration and a formal subsequent delivery, Mr. Justice Davis said: "The placing of the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed, and delivery of it to the register for that purpose, does not vest the title in the grantee." But the learned judge added as a qualification to this general rule, that "if Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him."² Where a deed has been delivered to the record-

¹ *Barns v. Hatch*, 3 N. H. 304; 14 Am. Dec. 369. And see, also, *Cravens v. Rossiter*, 116 Mo. 338; *Davis v. Garrett*, 91 Tenn. 147. Where a grantor requests the officer to record the deed but not to deliver it to anyone but himself, and afterward retains the custody, there is no valid delivery: *Stevens v. Castel*, 63 Mich. 111.

² *Parmelee v. Simpson*, 5 Wall. 81, 86. In *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210, Wilcox, J., said: "Possession held by the grantee of a deed duly executed is alone competent evidence of a delivery, for things shall be presumed legally and properly in their present state, unless the contrary be shown: 1 Cow. Phil. 1284; *Canning v. Pinkham*,

ing officer for the grantee's use, and the latter assents to it, the deed will prevail against an attachment made after such assent by one of the grantor's creditors. "We all think," says Putman, J., delivering the opinion of the court, "that the delivery to the register for the use of the grantee, and her assent to the same before the attachment (which is to be inferred from the facts above recited), was equivalent to an actual delivery to the grantee personally. If, therefore, it were made upon a good consideration, and *bona fide*, the title vested in her."¹ But the subsequent assent of the grantee does not operate by relation to pass the title as of the time of delivery against creditors of the grantors, whose rights have attached prior to the time the

1 N. H. 353; *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562. Indeed, when a deed is delivered to a third party with the intent on the part of the grantor that it shall take effect for the benefit of the grantee, the assent of the latter is presumed, and the deed takes effect from the time of delivery (*Towson v. Tickell*, 3 Barn. & Ald. 36; *Peavey v. Tilton*, Strafford County, July Term, 1846); so that there is no occasion to resort to presumptions to enable us to conclude that the deed has come into the hands of the demandants by means of a regular delivery by the tenant. There has been a regular delivery of the deed by the tenant to the recording officer, with the intent that it should pass to the grantees, and should in fact inure for their benefit from that moment. It was, in short, delivered to that officer for their benefit. Their assent to it, which is a legal presumption at that moment, has been established as a fact by their subsequent acts that have been adverted to." And see *Snider v. Lackenour*, 2 Ired. Eq. 360; 38 Am. Dec. 685; *Elsberry v. Boykin*, 65 Ala. 336; *Prignon v. Daussat*, 4 Wash. 199; 31 Am. St. Rep. 914; *Glaze v. Three Rivers etc. Fire Ins. Co.*, 87 Mich. 349.

¹ *Hedge v. Drew*, 12 Pick. 141, 144; 22 Am. Dec. 416. The court, however, granted a new trial to try the question whether the deed was made in good faith, or with the intention of delaying the creditors of the grantor. See, also, *Elsey v. Metcalf*, 1 Denio, 326; *Parker v. Hill*, 8 Met. 447; *Jackson v. Richards*, 6 Cowen, 617; *Oliver v. Stone*, 24 Ga. 63; *Folk v. Varn*, 9 Rich. Eq. 303; *Masterton v. Cheek*, 23 Ill. 72; *Prettyman v. Goodrich*, 23 Ill. 330; *Rathbun v. Rathbun*, 6 Barb. 98; *Kemp v. Walker*, 16 Ohio, 118; *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266; *Snider v. Lackenour*, 2 Ired. Eq. 360; 38 Am. Dec. 685; *Boody v. Davis*, 20 N. H. 140; 51 Am. Dec. 210. But a lien placed upon the land before assent is given will take precedence: *Parmelee v. Simpson*, 5 Wall. 81; *Denton v. Perry*, 5 Vt. 382; *Elmore v. Marks*, 39 Vt. 538, 542; *Baker v. Haskell*, 47 N. H. 479; 93 Am. Dec. 455; *Johnson v. Farley*, 45 N. H. 505; *Derry Bank v. Webster*, 44 N. H. 264. But see *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Tompkins v. Wheeler*, 16 Pet. 119.

grantee manifested his assent.¹ A delivery of a deed was held to be effectual where the conveyance had been signed, sealed, and acknowledged by a husband and wife, and sent by the former; in the latter's presence, to the recorder's office for recording.² In other words, it may be said that the delivery is valid when it appears that the deed was placed on record, with the intent that it should pass the title to the grantee, although never actually delivered to the grantee.³

§ 292. **Registration prima facie evidence of delivery.** The registration of a deed is *prima facie* evidence of its delivery.⁴ The presumption of delivery arising from the

¹ Hibberd v. Smith, 67 Cal. 547; 56 Am. Rep. 726.

² McNeely v. Rucker, 6 Blackf. 391. See Mallet v. Page, 8 Ind. 364; Somers v. Pumphrey, 24 Ind. 240; Hammell v. Hammell, 19 Ohio, 17; Kerr v. Birnie, 25 Ark. 225.

³ Moore v. Giles, 49 Conn. 570. See, also, Connard v. Colgan, 55 Iowa, 538.

⁴ Robinson v. Gould, 26 Iowa, 89; Lawrence v. Farley, 24 Hun, 293; Bensley v. Atwell, 12 Cal. 231; Kille v. Ege, 79 Pa. St. 15; Rigler v. Cloud, 14 Pa. St. 361; Bulkley v. Buffington, 5 McLean, 457; Warren v. Jacksonville, 15 Ill. 236; 58 Am. Dec. 610; Boardman v. Dean, 34 Pa. St. 252; Welborn v. Weaver, 17 Ga. 267; 63 Am. Dec. 235; Bullitt v. Taylor, 34 Miss. 708; 69 Am. Dec. 412; Rowell v. Hayden, 40 Me. 582; Ingraham v. Grigg, 13 Smedes & M. (21 Miss.) 22; Javenal v. Jackson, 14 Pa. St. 519; Balbeck v. Dondedson, 2 Grant Cas. 459; Blight v. Schenck, 10 Barr. 285; 51 Am. Dec. 478; Burke v. Adams, 80 Mo. 504; 50 Am. Rep. 510. See, also, Pearce v. Dansforth, 13 Mo. 360; Eau Claire Lumber Co. v. Anderson, 13 Mo. App. 429; Swiney v. Swiney, 14 Lea (Tenn.), 316; Hendricks v. Rasson, 53 Mich. 575; Lewis v. Watson, 98 Ala. 479; 39 Am. St. Rep. 82; Alexander v. Alexander, 71 Ala. 295; Fenton v. Miller, 94 Mich. 204; Sheffield Land etc. Co. v. Neill, 87 Ala. 158; Colee v. Colee, 122 Ind. 109; 17 Am. St. Rep. 345; Elsberry v. Boykin, 65 Ala. 336; Collins v. Collins, 45 N. J. Eq. 813; Compton v. White, 86 Mich. 33; Parrott v. Baker, 82 Ga. 364; Gordon v. Trimmier, 91 Ga. 472; Ross v. Campbell, 73 Ga. 309; Gage v. Gage, 36 Mich. 129; Glaze v. Three Rivers Ins. Co., 87 Mich. 349; Patrick v. Howard, 47 Mich. 40; Stevens v. Castel, 63 Mich. 111; Munoz v. Wilson, 111 N. Y. 295; Wallace v. Berdell, 97 N. Y. 13; Davis v. Garrett, 91 Tenn. 147; Quick v. Milligan, 108 Ind. 419; 58 Am. Rep. 49; Grundies v. Reid, 107 Ill. 304; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267; 35 Am. Rep. 166; McDaid v. Call, 111 Ill. 298; Kingsbury v. Burnside, 58 Ill. 310; 11 Am. Rep. 67; Bowman v. Griffith, 35 Neb. 361; 53 N. W. Rep. 140; Metcalfe v. Brandon, 60 Miss. 685.

registration of the deed is not conclusive, however, but may be rebutted by other evidence.¹ This presumption may be rebutted by the facts that the consideration was not paid by the grantee; that he never had the actual possession of the deed, nor any knowledge of its existence; and that the grantor continued in possession for a long time afterward, claiming the land as his own. "Doubtless the recording of a deed is evidence of a delivery, or, more properly, it is evidence from which a delivery may be presumed; but still it affords only a ground for a presumption, a presumption of fact; it may be rebutted and destroyed by other evidence."² So in

¹ Union Mut. Ins. Co. v. Campbell, 95 Ill. 267; 35 Am. Rep. 166.

² Boardman v. Dean, 34 Pa. St. 252, 254. In that case the only evidence of delivery was that the deed was recorded by some unknown agency in 1832. Possession of the land was never taken by the grantee, and he had no knowledge of the existence of the deed until 1857, and he had never paid the money mentioned as the consideration. The grantor remained in possession for ten years after the date and recording of the deed, when he sold the land to another. The court, per Strong, J., said: "Actual delivery was actually disproved. It is true that actual delivery is not, in all cases, necessary. It is sometimes said to be a question of intent, but it must be an intent to have the deed operate immediately, and an intent manifested by word or action. Here the instrument itself shows that it was not the intent of William Clark and wife that it should take effect, except upon the payment of the consideration. It was not a deed of gift, but one of bargain and sale, for the stipulated price of four hundred dollars. The payment of the consideration was necessary to transfer the use and make the instrument operative. But the proof was positive that the consideration was never paid. In this particular it differs from a deed of gift, or a release, of which the law will presume a delivery without proof of acceptance, and that, though the donee or releasee may not have known of the instrument. In such cases, his assent is inferred from the character of the writing as beneficial to the donee or releasee. It is true, there is here a receipt acknowledging payment of the consideration, but this is of no account against the positive testimony of Jerry Clark that it never was paid. The case of the Lessee of Mitchell v. Ryan, 3 Ohio St. 337, upon which the plaintiff in error relies, differs from the present in several important particulars. In that case, the transaction was a gift, not a sale. The alleged donee was an absent minor, and there was positive proof that the donor directed the deed to be put upon record. All these facts are wanting in the case now before us. Nor is it to be overlooked that Boardman cannot be regarded as a *bona fide* purchaser for value from the alleged grantee, and without notice, as was the claimant under the

New York, where the grantor and his representatives had been in undisturbed possession for more than forty years without recognizing any rights under a deed of land, valuable only for its use and occupation, the grantee never having been in possession, it was held that the presumption of the delivery of the deed from the fact of its registration was repelled, and that the contrary presumption arose, either that the deed was never delivered, or that a reconveyance had been executed.¹ So the pre-

deed in *Blight v. Schenck*, 10 Barr. 285; 51 Am. Dec. 478. The court of common pleas held in the present case that the facts already recited rebutted the presumption of delivery arising from the recording of the deed only, if added to them was the other fact, that Boardman, who claimed under Jerry Clark, was not a *bona fide* purchaser. Whether he was or not was submitted to the jury, and their verdict established that he was not. It may well be that stronger evidence is required to rebut the presumption of delivery when the deed is set up by a *bona fide* purchaser, who has advanced his money upon the faith of it, than when it is set up by the grantee himself, or one who stands in his shoes. But where the grantee denies any delivery or payment of the consideration, when he negatives all possession under the deed, or knowledge of its existence, where the instrument is one that cannot operate without his assent and his action, it is not for another who has surreptitiously obtained a conveyance from the grantee to set up the deed as having been delivered, without more evidence of delivery than is furnished by the fact that it is found upon the record."

¹ *Knolls v. Barnhart*, 71 N. Y. 474. In *Bensley v. Atwell*, 12 Cal. 231, the court say, per Baldwin, J., who delivered the opinion: "This deed purports to be a deed of bargain and sale on an alleged consideration, executed and acknowledged by the defendant, and on the same day recorded. This certainly is some evidence that the deed was perfected, and that it was intended to vest the title in the grantee. He might, if ignorant of its execution at the time, have at any time assented to it. It is scarcely to be presumed that one man will execute to another a deed without the assent of that other. Mr. Brooks, the witness, does not say that the grantee had no knowledge of the execution of this deed. We think the facts should have gone to the jury for them to say whether the grantee had this knowledge, or had given, directly or otherwise, his assent; and that the court did not err, on the facts stated by the witness, in refusing to rule that the deed was never delivered. Perhaps it would be too much in any case where the testimony of a witness contradicts the written acknowledgment of a party introducing him (as in this case that a deed was delivered), and also the fair presumption from the nature of the transaction, for the court to assume that the testimony of the witness is the fact, and to give effect to it as a legal conclusion. In this case the plaintiff admitted, by the execution of the deed and his ac-

sumption of delivery and acceptance is rebutted by showing the grantee's ignorance of the deed for seven years, and a prompt repudiation of the trust accompanying the deed when informed of its existence.¹

§ 293. Where acceptance of a deed depends upon conditions registration is not *prima facie* evidence of delivery.—A committee of a bank agreed to purchase from a person a tract of land, if the board of directors of the bank would assent to the transaction, and the counsel of the bank would give his approval. The vendor prepared the deed and informed the cashier of the bank of his intention to have it recorded, and the deed was afterward duly acknowledged and recorded. A judgment creditor of the vendor, after the deed had been filed for record, laid an attachment upon the consideration money to be paid by the bank. The counsel for the bank subsequently disapproved the purchase; the vendor was notified of the disapproval, and the property was re-conveyed to him by deed. The court held that there was no such delivery as to make the bank responsible under the attachment process, inasmuch as the acceptance of the deed by the bank was dependent upon events which never occurred, and that the bank could not be charged as grantee by the execution of the deed and placing it on record by the grantor without sufficient sanction from the bank. With reference to the reconveyance, the court held that its only effect was a disclaimer of record, and that it could not operate as evidence of the acceptance of the previous deed.²

knowledge of it for record, that he delivered it. The mere fact that the plaintiff was absent from the State, and that the deed was made at the instance of the grantor, or of the witness, is not conclusive evidence of its nondelivery": See *Lady Superior v. McNamara*, 3 Barb. Ch. 375; 49 Am. Dec. 184.

¹ *Metcalfe v. Brandon*, 60 Miss. 685.

² *Leppoc v. Union Bank*, 32 Md. 136. Alvey, J., who delivered the opinion of the court, said, in the course of the opinion: "But had the deed been accepted by the bank at the time of laying the attachment? As matter of law, on the facts found by the jury, we are bound to say

§ 293 a. Deed executed in payment of a debt.—

Where a deed is executed in payment of a debt, the assent of the grantee is necessary to its effect, and no title passes until such assent is given. Delivery of a deed, in such a case, to the recording officer, is not a delivery to the grantee.¹ So, if a deed contains a clause binding the grantee to assume and pay a mortgage, if the grantee has no knowledge or information of the existence of the deed, never was in the possession of the land, or knew of its existence, and if there was no prior contract or negotiation between the parties, the fact that the deed was duly recorded cannot bind the grantee.² It may be stated as a general proposition that, if the deed contains any clause imposing an obligation upon the grantee, its acceptance will not be presumed, as this would, in effect be placing a burden upon the grantee without his consent. And in

that it had not been accepted. The delivery of the deed was certainly essential to the transfer of the property; and without such transfer, no obligation was imposed on the bank. The delivery, to be effectual, required acceptance of the deed by the bank, and as we have seen, that was dependent on events that never occurred; and although the deed was made and placed on record, these were acts of the grantor without sufficient legal sanction of the bank to charge it as grantee. 'To constitute a good delivery,' says the Supreme Court of the United States in *Younge v. Guilbeau*, 3 Wall. 636, 'the grantor must part with the possession of the deed or the right to retain it. Its registry by him is entitled to great consideration upon this point, and might, perhaps, justify in the absence of opposing evidence, a presumption of delivery. But here in (that case) any such presumption is repelled by the attendant and subsequent circumstances. The registry was of course made without the assent of the grantee, as he had no knowledge of the existence of the deed, and the property it purported to convey always remained in the possession and under the control of the grantor.' And in the cases of *Hutchins v. Dixon, Executors of Hooper*, 11 Md. 29, and *Phelps' & Stewart's Lessee v. Phelps*, 17 Md. 120, it was decided by this court that while a deed duly *acknowledged and recorded* will be treated as having been delivered to and accepted by the grantee in the absence of all proof to the contrary, those facts only give rise to a *prima facie* presumption, liable of course to be repelled."

¹ *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606.

² *Gifford v. Corrigan*, 105 N. Y. 223. See, also, *Thompson v. Dearborn*, 107 Ill. 87; *Best v. Brown*, 25 Hun, 223.

the cases where an acceptance is presumed, the deed will be found to have been beneficial to the grantee.¹

§ 294. Possession of deed by grantee affords presumption of delivery.—The possession of a deed, duly executed in the hands of the grantee is *prima facie*, but not conclusive, evidence of its delivery.² It therefore follows that he who disputes this presumption has the burden of

¹ *Palmer v. Hall*, 62 Iowa, 204; *Owings v. Tucker*, 90 Ky. 297; *Hall v. Hall*, 107 Mo. 101; *Spencer v. Carr*, 45 N. Y. 406; 6 Am. Rep. 112; *Tobin v. Bass*, 85 Mo. 654; 55 Am. Rep. 392; *Cook v. Patrick*, 135 Ill. 499; *Masterson v. Cheek*, 23 Ill. 72; *Davenport v. Prewitt*, 9 B. Mon. 94.

² This section was cited as authority in *Black v. Sharkey*, 104 Cal. 279; *Chandler v. Temple*, 4 Cush. 285; *Brittain v. Work*, 13 Neb. 347; *Newlin v. Beard*, 6 W. Va. 110; *Billings v. Stark*, 15 Fla. 297; *Kidder v. Stevens*, 60 Cal. 414; *Cutts v. York Co.*, 18 Me. 190; *Canning v. Pinkham*, 1 N. H. 353; *Carnes v. Platt*, 41 N. Y. Sup. Ct. 435; *Green v. Yarnall*, 6 Mo. 326; *Reed v. Douthit*, 62 Ill. 348; *Clark v. Ray*, 1 Har. & J. 319; *Tuttle v. Turner*, 28 Tex. 759; *Houston v. Stanton*, 11 Ala. 412; *Ward v. Ross*, 1 Stewt. 136; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359; *Boody v. Davis*, 20 N. H. 140; 51 Am. Dec. 210; *Mills v. Mills*, 57 Fed. Rep. 873; *Lewis v. Watson*, 98 Ala. 479; 39 Am. St. Rep. 82; *Fenton v. Miller*, 94 Mich. 204; *Campbell v. Carruth*, 32 Fla. 264; 13 So. Rep. 432; *McClellan v. Zurngli*, 24 N. Y. S. 371; *Strough v. Wilder*, 119 N. Y. 530; *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Turner v. Warren*, 160 Pa. St. 336; *Squires v. Summers*, 85 Ind. 252; *Faulkner v. Adams*, 126 Ind. 459; *Pool v. Davis*, 135 Ind. 323; *Scovey v. Walker*, 114 Ind. 254; *McFall v. McFall*, 136 Ind. 622; *Berry v. Anderson*, 22 Ind. 36; *Black v. Thornton*, 30 Ga. 361; *Simmons v. Simmons*, 78 Ala. 365; *Goodlett v. Kelly*, 74 Ala. 213; *Cherry v. Herring*, 83 Ala. 458; *Griffin v. Griffin*, 125 Ill. 430; *Tunison v. Chamblin*, 88 Ill. 378; *Loveland v. Loveland*, 136 Ill. 75; *Whitman v. Singleton*, 108 N. C. 193; *Butrick v. Tilton*, 141 Mass. 93; *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151; *Craven v. Winter*, 38 Iowa, 471; *Hutton v. Smith*, 88 Iowa, 238; 55 N. W. Rep. 326; *Wolverton v. Collins*, 34 Iowa, 238; *Blair v. Howell*, 68 Iowa, 619; *Smith v. Adams*, 4 Tex. App. 5; *Tuttle v. Rainey*, 98 N. C. 513; *Williams v. Springs*, 7 Ired. 384; *Dwinell v. Bliss*, 58 Vt. 353; 5 Atl. Rep. 317; *Hill v. Hill*, 119 Ill. 242; 10 N. E. Rep. 667; *Loveland v. Loveland*, 136 Ill. 75; 26 N. E. Rep. 381; *Little v. Gibson*, 39 N. H. 505; *Andrews v. Dyer*, 78 Me. 427; *Hatch v. Haskins*, 17 Me. 391; *Morris v. Henderson*, 37 Miss. 492; *Valentine v. Wheeler*, 116 Mass. 478; *Butrick v. Tilton*, 141 Mass. 93; *Windom v. Schuppel*, 39 Minn. 35; 38 N. W. Rep. 757; *Ward v. Lewis*, 4 Pick. 518; *Chandler v. Temple*, 4 Cush. 285; *Scott v. Scott*, 95 Mo. 300; *Robinson v. Wheeler*, 25 N. Y. 252; *Allen v. De Groodt*, 105 Mo. 442; *Vreeland v. Vreeland*, 48 N. J. Eq. 56; 21 Atl. Rep. 627; *Flint v. Phipps*, 16 Or. 437; 19 Pac. Rep. 543. And see *Wedel v. Herman*, 59 Cal. 507. The possession of a deed by the grantee is not

proof, and must show that there has been no delivery.¹ And not only must this presumption be overcome, but it is held that there is such a strong implication that it has been delivered when it is found in the hands of the grantee that only strong evidence can rebut the presumption. The unsupported evidence of the grantor, some fifteen or twenty years after the date of the deed, is not sufficient to overturn the presumption of delivery arising from possession. Mr. Justice Walker very pertinently observes: "When a deed, duly executed, is found in the hands of a grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. Otherwise, titles could be easily defeated, and no one could be regarded as being secure in the ownership of the land. It cannot be that a grantor may assail a conveyance fifteen or twenty years after a deed has been made, and recover the land by merely swearing that he never delivered the deed. The unsupported evidence of the grantor surely cannot be permitted to have such effect, especially when the evidence of such a grantor is, in many material matters, contradicted, and who seems to act on a low moral plane. To so hold would render all titles insecure, and would be disastrous in the extreme. Any system of jurisprudence adopting rules for the attainment of justice can never sanction a rule fraught with such unjust and iniquitous results."² The delivery of a deed to a person and its acceptance by him are sufficiently shown to justify its reception in evidence by its production by his attorneys at a trial, and further proof

conclusive on the question of delivery. Parol evidence may be introduced to show nondelivery: *Black v. Sharkey*, 104 Cal. 279.

¹ *Roberts v. Swearington*, 8 Neb. 363.

² *Tunison v. Chamblin*, 88 Ill. 379, 387. See, also, *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Richmond v. Morford*, 4 Wash. St. 337; *Cummings v. Glass*, 162 Pa. St. 241; *Simmons v. Simmons*, 78 Ala. 365; *Pitts v. Sheriff*, 108 Mo. 110; *Cherry v. Herring*, 83 Ala. 458; *Blair v. Howell*, 68 Iowa, 619; *Mills v. Mills*, 57 Fed. Rep. 873; *Cutts v. York Mfg. Co.*, 18 Me. 190; *Strough v. Wilder*, 49 Hun, 405; *McCann v. Atherton*, 106 Ill. 31.

of delivery and acceptance is not required.¹ A grantor, without the prior knowledge of the grantees, went alone to a magistrate, and executed and acknowledged a deed, and it appeared, from his conversation with the magistrate, that he desired to execute the deed for the purpose of defeating a railroad mortgage on the land which he thought he ought not to pay. No testimony except that of the grantees was given showing that the deed was ever seen after its execution by any one until after the grantor's death, thirteen years later, when the deed was recorded.* The grantor was unmarried, and the grantees were his nephews, and they lived with him upon the land, which they all worked in common. The land was assessed to the grantor until his death, and the tax receipts were found among his papers. After the execution of the deed the grantor retained possession and control of the land as before. These circumstances, it was held, rebutted the presumption of delivery arising from the fact that the deed was in the possession of the grantees.²

§ 295. Parol evidence admissible to rebut presumption arising from possession of deed.—It may be shown by parol evidence that a deed in the possession of the grantee was not delivered. The principle that parol evidence is not admissible to contradict a deed has no application to a case of this kind.³ There is a distinction to

¹ *Branson v. Caruthers*, 49 Cal. 374.

² *Stewart v. Stewart*, 50 Wis. 445.

³ This section was cited as authority in *Black v. Sharkey*, 104 Cal. 279; *Adams v. Frye*, 3 Met. 103; *Black v. Shreve*, 13 N. J. Eq. 457; *Wolverton v. Collins*, 34 Iowa, 238; *Johnson v. Baker*, 4 Barn & Ald. 440; *Den v. Farlee*, 1 N. J. 279; *Little v. Gibson*, 39 N. H. 505; *Williams v. Sullivan*, 10 Rich. Eq. 217; *Morris v. Henderson*, 37 Miss. 501; *Black v. Sharkey*, 104 Cal. 279. See *Goodlett v. Kelly*, 74 Ala. 213. In *Roberts v. Jackson*, 1 Wend. 478, 485, it is said: "The second ground of defense rests on the deed from Webb. In relation to this point, the jury have found that the deed from Webb to the defendant was never delivered; and this verdict is fully warranted by the evidence. The only question here is, whether parol evidence could be received to show the nondelivery. It is always competent to show that the deed was delivered as an escrow, or that the grantee obtained possession of it by

be drawn between a case where evidence is offered for the purpose of showing that a deed was not to be delivered until the performance of some condition precedent, and a case where it was actually delivered with an agreement that the condition was to be performed. In the former case the object of introducing such testimony is to show that the instrument was never legally delivered, and that, consequently, it never possessed any validity. In the latter, the effect of the evidence would be to contradict a written instrument, which is absolute upon its face, by showing in opposition to its terms that it was conditional and not absolute.¹

§ 296. Inferring delivery from execution of deed in presence of witnesses.—It is said that the fact that a deed was sealed in the presence of witnesses is evidence from which the inference of a delivery may be drawn. “When an instrument of conveyance is sealed and delivered, with the intention on the part of the grantor that it should operate immediately, and there is nothing to qualify the delivery but keeping the deed in the hands of the grantor, it is a valid and effectual deed, in law and equity, and execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer delivery.”²

fraud or in an unwarrantable manner. This must, of necessity, be shown by parol, and this species of evidence has never been considered as coming within the rule which rejects parol proof when offered to contradict a deed.”

¹ *Black v. Lamb*, 12 N. J. Eq. 116. And see *Ford v. James*, 2 Abb. N. Y. App. 162.

² *Moore v. Hazelton*, 9 Allen, 102, 106, per Gray, J. This case was cited in *Howe v. Howe*, 99 Mass. 98, where Hoar, J., says: “We are of opinion that there was some evidence of the delivery of the mortgage. Its weight or sufficiency is not open for consideration under this bill of exceptions. Execution of a deed in the presence of an attesting witness is evidence from which to infer a delivery: *Moore v. Hazelton*, 9 Allen, 102, and cases there cited. The authorities on which the petitioner relies are those in which the sufficiency of the evidence to establish the legal delivery of an instrument has been in question. Here the execution of the mortgage was not a necessary fact to be proved in the case. It came in merely incidentally, as one of the circumstances attending the principal transaction; and though the evidence was very slight, the

Evidence, however, of this character alone must be weak and unsatisfactory. All that can be claimed for it, perhaps, is that it shows an intention on the part of the grantor to execute an operative conveyance. When, however, the intention of the grantor appears to have been to retain the deed, subject to his control, this evidence can avail but little. Delivery is included in the execution of a deed, and where the execution of a deed is duly proved, and during the trial it is read in evidence, without objection, the point cannot be raised at the close of the case that the plaintiff has not shown a delivery.¹ But while an inference may be drawn from slight evidence that a deed was delivered, no legal presumption exists that a deed is delivered because it is signed and acknowledged.²

court could not be required to rule that there was none": See, also, *Fletcher v. Fletcher*, 4 Hare, 79, 80; *Doe v. Knight*, 4 Barn. & C. 671; s. c. 8 Dowl. & R. 348; *Hope v. Harman*, 16 Q. B. 751; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75; *Jeffries v. Alexander*, 8 H. L. Cas. 594; *Rushin v. Shields*, 11 Ga. 636; 56 Am. Dec. 436; *Hall v. Palmer*, 3 Hare, 532; *Burton v. Boyd*, 7 Kan. 17; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237; *Nay v. Mognrain*, 24 Kan. 75; *Parrott v. Avery*, 159 Mass. 594; 38 Am. St. Rep. 465; *Diehl v. Emig*, 65 Pa. St. 320; *Hill v. McNichol*, 80 Me. 209; *Davis v. Williams*, 57 Miss. 843; *Stewart v. Reddit*, 3 Md. 67; *Kille v. Ege*, 79 Pa. St. 15; *Ensworth v. King*, 50 Mo. 477; *Linton v. Brown*, 20 Fed. Rep. 455; *Lyon v. McIlodine*, 24 Iowa, 9; *Phelps v. Phelps*, 17 Md. 120; *Himes v. Keighblisher*, 14 Ill. 469; *Leppoc v. National Union Bank*, 32 Md. 136; *Hutchins v. Dixon*, 11 Md. 29. And see *Alexander v. De Kermel*, 81 Ky. 345.

¹ *Van Rensselaer v. Secor*, 32 Barb. 469.

² *Boyd v. Slayback*, 63 Cal. 493. In *Fisher v. Hall*, 41 N. Y. 416, 421, the court, per Daniels, J., said: "It is not necessary that the grantee, or his agent or servant, should be present at the execution, in order to have such a delivery of the instrument made as will give it operation, validity, and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that effect. The mere subscribing and sealing, accompanied with the ordinary attestation of those acts by the witnesses, which is all there is any reason for supposing was done in the present instance, followed by the grantor keeping the deed in his own custody, and his continued possession of the premises, are not sufficient to constitute a legal delivery of a sealed instrument. Several old authorities in equity were cited upon the argument for the purpose of showing the rule to be different

§ 297. Inference of acceptance from relationship between person receiving the deed and the grantee.—Where the grantee has not actually received the deed, his acceptance may in some cases be implied from the relationship existing between him and the person to whom it is actually delivered. This principle is, perhaps, most frequently applied in cases where the grantees are minors and the deeds are delivered to their parents. Thus, a grantor made and executed a deed in favor of his granddaughter, who at the time was a minor. The deed was given to her father to be held by him for her until she should arrive at sufficient discretion to take care of it, and it was held that the delivery of the deed to her father was for her use and benefit, and her acceptance would be presumed.¹ In a case in Alabama, it appeared in the testimony of the subscribing witnesses to a deed that immediately after the execution the grantor placed it in the hands of the mother of the grantees, who were infants, telling her to keep it. The court held that this testimony was at least sufficient to permit the deed to go to the jury, and that the question of whether the intention of the grantor was that it should or should not be considered as delivered, was one of fact for the jury to determine.²

from this statement of it. And it must be confessed that they appeared to maintain that result; but they are evidently so directly opposite to the entire current of modern authority, both in the courts of this and of the other states, as well as of the United States, as to require them to be repudiated by this court. A rule of law by which a voluntary deed executed by the grantor, afterward retained by him during his life, in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property, as to deserve no toleration whatever from any intelligent court either of law or equity." See, also, *Bryant v. Bryant*, 42 N. Y. 11; *Weed v. Hewlett*, 12 N. Y. Sup. 606; *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281; *McFadgen v. Eesensmidt*, 10 Humph. 567; *Hutchinson v. Rust*, 2 Gratt. 394; *Union Mut. Life Ins. Co. v. Campbell*, 95 Ill. 267; 35 Am. Rep. 166; *Davis v. Williams*, 57 Miss. 843; *Turner v. Carpenter*, 83 Mo. 333; *Wiggins v. Lusk*, 12 Ill. 132. But see *Carver v. Carver*, 97 Ind. 497.

¹ *Bryan v. Wash*, 2 Gilm. 557.

² *Gregory v. Walker*, 38 Ala. 26. See, also, *Souverbye v. Arden*, 1

§ 297 a. Estoppel of grantor.—A grantor may be estopped from asserting that a deed unrecorded was delivered to him, so as to limit his title, when he has conveyed a title free from restrictions. Thus, where a grantor executed a deed conveying all the right, title, and interest that he had inherited from his father in the land conveyed, and declared to the grantee, at the time of the execution of the deed, that a prior deed from his father to him which had not been recorded, and which contained restrictions on the right of alienation had never been delivered nor accepted, he is estopped from denying that his deed passed the estate which he would have acquired in the absence of a deed from his father to him.¹

§ 298. Delivery to several grantees.—It would seem to be sufficient that when the grantor has parted with all control over the deed, that a delivery has been made to all the parties named as grantees, unless he makes some declaration, or performs some act evincing a different intention. But it has been held that if there be two or more grantees, and the grantor delivers the deed to one of them only, and says nothing concerning the others, the deed is void as to them.²

Johns. Ch. 456; *Morrison v. Kelly*, 22 Ill. 612; 74 Am. Dec. 169; *Jaques v. Methodist Church*, 17 Johns. 577; 8 Am. Dec. 447; *Cloud v. Calhoun*, 10 Rich Eq. 358, 362.

¹ *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337.

² *Hannah v. Swarner*, 8 Watts, 9; 34 Am. Dec. 442. *Gibson, C. J.*, delivering the opinion of the court, said: "It is said in *Viner's Abridgment*, *Faits I.*, 7, 'if a man make an obligation to two, and deliver to one of them only, and say nothing of the other on the livery, the deed is void as to him,' for which he cites the *Year Book*, 3 H. 6, 19. So in *Hungate's case*, 5 Rep. 103, an action was not maintained on a bond to perform an award, if made and delivered to the defendants by such a day, on proof that it was delivered to one of the grantees; for the jury explicitly say that they are ignorant whether the delivery to him was assented to by the others. In the *Bank of Washington v. Smith*, 5 Serg. & R. 318, the assent of an absent grantee was presumed; but there was an actual delivery to a third person, and to the grantee's present use, a circumstance which is wanting here, and which is a distinguishing one, perhaps, in all the cases. In *Taw v. Bury*, 2 Dyer, 167 b, A delivered his bond to the obligee as his deed; the obligee refused to receive it,

§ 299. **Comments.**—It may well be doubted that the case cited in the preceding section contains a proper statement of the correct rule. In the case in which this conclusion was reached, the jury found simply that a deed was made, but failed to declare whether there had been a delivery or not. If they had declared under these circumstances that a delivery was made to all the grantees, we do not see how their finding could be successfully assailed. It certainly must have been the intention of the grantor to execute a valid instrument transferring his title. In parting with all control over the deed and delivering it to one of the grantees, it would, in our judgment, seem fair to infer that by that act he intended to

whereupon B left it; but the obligee afterward sued and recovered on it, because, by the first delivery, it was A's deed without delivery over, though, had it been given to be delivered over on the performance of a condition, it would have been otherwise. But if the writing be given to a stranger without any intimation or declaration of intention, it remains inoperative; 'for the bare act of delivery to him without words worketh nothing': Co. Litt. 36 a. The rule to be extracted from all this is, that a delivery to a third person for the present use of the grantee, makes the instrument a present deed; but that a delivery to his use when he shall perform a condition, makes not a present deed, and the grant may be frustrated by his refusal to perform it; and that a bare delivery to a stranger, without words of direction to deliver over to the grantee, either absolutely or conditionally, is merely void. Now, the most favorable construction that can be made for the defendant is to say that for the purpose of receiving a deed, each of the grantees must be considered as standing in the relation of a stranger to the rest, else a delivery to the one, without direction to deliver it to the others, would perfect the deed as to all, which we have seen is not so; and here it is not found that there was any direction to the grantee who received the deed, it being nakedly affirmed that it was delivered to him and kept in his possession. Had it been given to him for delivery to the others also, it would have presently vested the estate in them without their consent; insomuch that they could not, on the principle of Butler and Baker's case, 3 Rep. 25, have divested it by a subsequent expression of oral dissent. But no such fact is found; and we are unable to pronounce, on the premises, that there was a delivery in law. The difficulty is to say whether enough is found to enable us to give judgment for any one. The jury have set forth an instrument in the form of a deed, and it was their business to find a delivery in fact, or circumstances constituting a delivery in law, or to find that it was not delivered at all." The court, therefore, held that the case was insufficiently found, and remitted it to another jury to find whether there was or not an actual delivery.

divest himself of the title, and to convey it to the grantees. If he had, however, declared that the delivery to one was not to inure to the benefit of the others, of course there would be no delivery to them. But in the absence of any such declarations or circumstances showing that to be his intention, we think that a delivery to one would be a delivery to all. Thus, it is held that where the grantee has only a qualified estate, which is defeasible on the occurrence of an event when the estate is to pass to others, a delivery of the deed to the first grantee is sufficient for all purposes.¹

§ 300. Deed once executed and delivered cannot be revoked.—When a deed has been properly executed and delivered, it operates as a transfer of title. Its redelivery to the grantor or its cancellation cannot operate as a retransfer of the title so conveyed. Where it has once become effective, it cannot be defeated by any act occurring afterward, unless it be by force of some condition contained in the deed itself.² The redelivery of a deed is

¹ *Folk v. Varn*, 9 Rich. Eq. 303; *Phelps v. Phelps*, 17 Md. 120. A delivery to one of two grantees intending to hold as tenants in common is a delivery to both: *Minor v. Powers* (Tex. Civ. App.), 24 S. W. Rep. 710; *Eshleman v. Henrietta Vineyard Co.*, 102 Cal. 199; *Powers v. Minor*, 87 Tex. 83.

² *Rogers v. Rogers*, 53 Wis. 36; 40 Am. Rep. 756; *Connelly v. Doe*, 8 Blackf. 320; *Taliaferro v. Rolton*, 34 Ark. 503; *Snodgrass v. Rickett*, 13 Cal. 359; *Jeffers v. Philo*, 35 Ohio St. 173; *Kearsing v. Killan*, 18 Cal. 491; *Brady v. Huff*, 75 Ala. 80; *Bowman v. Cudworth*, 31 Cal. 148; *Killy v. Wilson*, 33 Cal. 691; *Lawton v. Gordon*, 34 Cal. 36; 91 Am. Dec. 670; Cal. Civil Code, § 1058; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Parker v. Kane*, 4 Wis. 1; 65 Am. Dec. 283; *Warren v. Tobey*, 32 Mich. 45; *Somers v. Pumphrey*, 24 Ind. 240; *Reavis v. Reavis*, 50 Ala. 60; *Duncan v. Wickliffe*, 5 Ill. (4 Scam.) 452; *Graysons v. Richards*, 10 Leigh, 57; *Morgan v. Elam*, 4 Yerg. 375; *Tibeau v. Tibeau*, 19 Mo. 78; 59 Am. Dec. 329; *Shelton's case*, Cro. Eliz. 7; *Potter v. Adams*, 125 Mo. 118; 46 Am. St. Rep. 478; *Waters v. Wagley*, 53 Ark. 509; 22 Am. St. Rep. 232; *National Union Building Ass. v. Brewer*, 41 Ill. App. 223; *Miller v. Church*, 112 N. C. 626; 17 S. C. 437; *Martin v. Martin* (Ky.), 20 Ill. 375; *Shovers v. Warwick*, 152 Ill. 355; *Edwards v. Dickenson*, 102 N. C. 519; *Turner v. Warren*, 160 Pa. St. 336; *Howard v. Huffman*, 3 Head, 562; 75 Am. Dec. 783; *Cranmer v. Porter*, 41 Cal. 462; *Berry v. Kinnaird* (Ky.), 20 S. W. Rep. 511; *Seibel v. Rapp*, 85 Va. 28; 6 S. E. Rep. 478; *Hollings-*

not only ineffectual to retransfer the title, but also to revive a debt for the extinguishment of which the deed was given.¹ "The decided weight of authority is that the surrender of a deed, though not registered, will not operate to revest the grantor with the title."² The fact that both grantor and grantee suppose that a deed will not take effect until recorded, and might be revoked at any time before that is accomplished, does not alter its legal character as a conveyance where it has been delivered to the grantee.³ Nor will a contemporaneous parol agreement between parties who have reciprocally executed and deliv-

worth v. Walker, 98 Ala. 543; 13 So. Rep. 6; Gimon v. Davis, 36 Ala. 589; Bailey v. Campbell, 82 Ala. 342; King v. Crocheron, 14 Ala. 822; Smith v. Cockrell, 66 Ala. 64; Lapowski v. Smith, 1 Tex. Civ. App. 391; 20 S. W. Rep. 957; Hyne v. Osborn, 62 Mich. 235; 28 N. W. Rep. 821; Campbell v. Jones, 52 Ark. 493; 12 S. W. Rep. 1016; Strawn v. Norris, 21 Ark. 80; Furguson v. Bond, 39 W. Va. 561; 20 S. E. Rep. 591; Douglas v. West, 140 Ill. 455; Walton v. Burton, 107 Ill. 54; Botsford v. Morehouse, 4 Conn. 550; Burton v. Wells, 30 Miss. 688; Connor v. Tippet, 57 Miss. 594; McAllister v. Mitchner, 68 Miss. 672; Partee v. Mathews, 53 Miss. 140; Kelly v. Wagner, 61 Miss. 299; Jordan v. Pollock, 14 Ga. 145; Dukes v. Spangler, 35 Ohio St. 119; Jeffers v. Philo, 35 Ohio St. 173; Thomas v. Groesbeck, 40 Tex. 530; Henderson v. Hodgen, 67 Ill. 179; Albright v. Albright, 70 Wis. 528; 36 N. W. Rep. 254; Rogers v. Rogers, 53 Wis. 36; 40 Am. Rep. 756; Feely v. Hoover, 130 Pa. St. 107; Blewett v. Front Street Cable Ry. Co., 49 Fed. Rep. 126; Vaughan v. Moore, 89 Va. 525; 37 Am. St. Rep. 888; Albert v. Burbank, 25 N. J. Eq. 404; Ray v. Wilcoxson, 107 N. C. 514; Edwards v. Dickinson, 102 N. C. 519. And see Byron v. Bradshaw, 23 Cal. 528; Rootes v. Holliday, 6 Munf. 251; Mallory v. Stodder, 6 Ala. 801; Wallace v. Bardell, 97 N. Y. 13.

¹ Starr v. Starr, 1 Ohio, 321.

² Strawn v. Norris, 21 Ark. 80, 82, and cases cited. Where a deed is made on condition that the grantee shall support the grantor during his lifetime, and he has performed the condition for several years before surrendering the deed, the deed will not be canceled at the suit of a second grantee to whom a similar deed had been made under the belief that the surrender retransferred the title to the grantor, but the second grantee will have a lien on the land for what he has expended in performing the condition: Martin v. Martin (Ky.), 20 S. W. Rep. 375. Where a father had conveyed land to his daughter, a married woman, who retained the deed for a year without recording it, and prior to her death returned it to her father, instructing him to destroy it, which he did, it was held that as she possessed the title she could convey it only by deed: Miller v. Church, 112 N. C. 626; 17 S. E. Rep. 437.

³ Hinchliff v. Hinman, 18 Wis. 130.

ered deeds, that they shall not be probated for registry until one of the parties shall perfect the title to the land conveyed by him, prevent the vesting of the titles in accordance with the terms of the deeds. In such a case it is immaterial that the parties did or did not understand whether this would be the legal result of their acts.¹ The title remains in the grantee when it has once become vested in him, notwithstanding the destruction of the deed or its return to the grantor, and although the latter has, through the direction of the grantee again executed a deed to another.²

§ 301. Illustrations of the foregoing rule.—A grantee went into possession of a piece of land under an absolute deed, and paid about half of the purchase price. Finding himself, however, unable to pay the residue, he sent back the deed, which had not been recorded, to the grantor,

¹ *Walker v. Renfro*, 26 Tex. 142. Wheeler, C. J., delivering the opinion of the court, says: "The deeds of the 6th of January, 1853, were executed and delivered to the parties respectively. The effect undoubtedly was to vest the title in accordance with the terms of the deeds. That effect, it is conceived, could not be obviated by the parol contemporaneous agreement that they should not be probated for registry until Renfro should perfect the title to the Sigler labor. The parties may not have been aware that such was the effect of the delivery. How that was we are not certainly informed; but, however it may have been, their not understanding its effect could not change the legal consequence of the act. Where a deed has thus been delivered to the grantee, it is questionable whether in the absence of fraud parol evidence can be heard to prove that it was not to take effect according to its import. It may be shown that a deed was never duly delivered, or was delivered as an escrow; or that the grantee obtained it fraudulently, or in an improper manner, etc. This species of evidence has not been considered as coming within the rule which rejects parol proof when offered to contradict a deed: *Roberts v. Jackson*, 1 Wend. 484. But here the deed was not delivered to a third person as an escrow; it is not pretended that it was duly delivered and accepted by the grantee completely and regularly executed. In *Ward v. Lewis*, 4 Pick. 518, 520, it was held that where a deed, with the evidence of complete and unqualified execution on its face, has been signed, sealed, and delivered to the party, parol evidence of an agreement or understanding that it should not take effect until a certain event, is inadmissible as going to vary the terms of the deed, and make that conditional which appeared to be absolute."

² *Cunningham v. Williams*, 42 Ark. 170.

to be canceled. He and the grantor went again into possession, giving up the notes for the residue of the purchase money. A creditor of the grantee then levied an execution upon the land as the property of the grantee, and brought an action of ejectment against the grantor for it. The court held that inasmuch as the title did not revest in the grantor by the return and cancellation of the deed, the creditor was entitled to recover.¹ In another case, a grantee being seised and possessed of land under an unrecorded deed, contracted to sell the land to a third person, and for that purpose destroyed the deed in his possession from the grantor, who at the grantee's request made a new conveyance to such purchaser. All the parties at the time supposed this was a proper mode of conveying the title, but it was held that although the deed to such purchaser was recorded, the title still remained in the original grantee.² A executed a deed containing covenants of warranty and seisin to B, and the latter without entering into possession or recording his deed, mortgaged the land to C, who immediately placed his conveyance on record. Afterward B delivered up his unrecorded deed to A, and received back the notes which he had given for the purchase money. A deed was afterward executed to D, containing the usual covenant of seisin, and it was held that this covenant was broken at the time the deed was executed.³

¹ Botsford v. Morehouse, 4 Conn. 550.

² Raynor v. Wilson, 6 Hill, 469.

³ Gilbert v. Bulkley, 5 Conn. 262; 13 Am. Dec. 57. Hosmer, C. J., speaking for the court says: "The plaintiff's action is founded on the covenant of seisin, in which the defendant stipulated that he and his wife Clara, at the execution of the deed, were well seised of the premises. Were they well seised? Most unquestionably they were not. They had several months before executed a deed of the land, with covenants of seisin and warranty, to one Dunscombe; and by this act deprived themselves of the seisin of the premises, so that their covenant was untrue, and broken instantaneously as soon as it was made. Whether the plaintiff, by the omission of Dunscombe to record his deed, and by procuring his own to be recorded, had acquired a title as against Dunscombe, is a very irrelevant question. If, by facts *subsequent* to the delivery of his deed he had, the position would not be the less true, that

§ 301 a. Trustee of resulting trust.—Where a grantor, who is the trustee of a resulting trust, conveys the land by a deed which is not recorded, but is subsequently delivered back and then destroyed with the consent of the grantee, the legal title having become vested in the grantee, does not return to the trustee by the subsequent destruction of the conveyance. The grantee may maintain an action to quiet his title to the land so conveyed.¹

§ 301 b. Erasure of grantor's name.—The erasure of the grantor's signature after the death of the grantee will not destroy the effect of the deed. A case that well illustrates the rule that where a deed has been once delivered, its cancellation will not revest the title, is where an owner of land, prior to his marriage, executed a deed to his intended wife, and also prepared a blank will to be executed by her, after their marriage, devising the land described in the deed to him, the deed being acknowledged by the grantor and handed by him to the husband of the sister of his intended wife, who delivered it to the grantee.

the defendant and wife were not seised at the execution of the deed to the plaintiff. The plaintiff had right to the full benefit of his covenant, and is not obliged to enter into a legal controversy with Dunscombe or Dayton, in which he may be foiled by proof that, at the date of his deed, he knew of the deed to Dunscombe. The surrender of the deed to the defendant is likewise a perfectly immaterial fact. If by this act the defendant had acquired title, it would have no bearing on the above question in this case, which, let it be remembered, is merely this, whether the defendant and wife, at the execution of his deed to the plaintiff, were well seised. But no title was thus acquired. The legal evidence of title was given up, but the title in Dunscombe remained. Land once conveyed cannot be retransferred by a destruction of the conveyance; but a deed executed with all legal solemnities, is as requisite for this purpose, as if the evidence had not been destroyed: *Botsford v. Morehouse et al.*, 4 Conn. 550; *Coe et al. v. Turner et ux.*, 5 Conn. 86. The verbal agreement, at the delivery of the deed to Dunscombe, was null and of no legal effect." And see, also, *Cravener v. Bowser*, 4 Pa. St. 259; *Holmes v. Trout*, 7 Peters, 171; *Lewis v. Payn*, 8 Cowen, 71, 75; 18 Am. Dec. 427; *Jackson v. Gould*, 7 Wend. 364, 366; *Chessman v. Whittemore*, 23 Pick. 231; *Roe v. Archbishop of York*, 6 East, 86; *Bolton v. Bishop of Carlisle*, 2 Black. H. 259; *Doe v. Bingham*, 4 Barn. & Ald. 672; *Perrott v. Perrott*, 14 East, 422; *Harrison v. Owen*, 1 Atk. 519.

¹ *Weygant v. Bartlett*, 102 Cal. 224.

The grantor and grantee afterward were married, but, before this event, the deed was placed in the grantor's safe, where it remained until the death of his wife. After his wife's death the grantor took the deed from the safe, the wife's brother in law being present at the time, who saw that the signature to the deed was unaltered. The husband, later, took out letters of administration on the estate of his deceased wife, and placed the deed with other of her papers in the hands of his counsel, with whom they remained until after the husband's death. It was then discovered that the signature to the deed had been erased. The court held, that the delivery of the deed to the grantee was sufficiently established by the evidence, and that her rights could not be defeated by the fact that the deed was kept in the husband's safe, but that the erasure of the grantor's signature, after delivery of the the deed, could not revest title in the husband, nor was the wife's legal title to the land divested by her failure to make a will.¹ If a deed, properly executed and delivered, is intrusted to the grantor to secure the signature of his wife, and she destroys it, the title of the grantor nevertheless passes to the grantee.² Where a deed is complete on its face it cannot be shown that it was delivered only as an escrow, or as evidence of the receipt of the purchase money.³

§ 302. A different doctrine prevails in some of the States.—In some of the States, particularly those of New England, while recognition seems to be given to the general rule previously stated, yet it is held that the redelivery of an unrecorded deed to the grantor operates to revest in him the title.⁴ It was held in an early case in Massa-

¹ *Turner v. Warren*, 160 Pa. St. 336.

² *Hyne v. Osborn*, 62 Mich. 235.

³ *Hargrave v. Melbourne*, 86 Ala. 270.

⁴ *Farrar v. Farrar*, 4 N. H. 191; 17 Am. Dec. 410; *Tomson v. Ward*, 1 N. H. 9; *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234; *Dodge v. Dodge*, 33 N. H. 487; *Holbrook v. Tirrell*, 9 Pick. 105; *Nason v. Grant*, 21 Me. 160; *Faulks v. Burns*, 1 Green Ch. 250; *Patterson v. Yeaton*, 47 Me. 314. And see *Potter v. Adams*, 125 Mo. 118; 46 Am. St. Rep. 478.

chusetts, where a grantee, in possession of land by a deed duly executed but not recorded, contracts to sell the land to a third person, and for that purpose cancels the grantor's deed, and the latter, at the grantee's request, makes a new conveyance to such third person, he takes a valid title, notwithstanding the original grantee continues in possession of the land jointly with him after the execution of the last deed.¹ In a later case in the same State, while it was conceded that the mere cancellation of a deed by the grantee, who holds under it, does not divest his title or reconvey it to the grantor, it was, however, held that if A conveys land to B by a deed, which is not recorded, though B takes possession by virtue of the conveyance, and he sells the land to C, delivering up the deed to A, and having it canceled, and A executes a new deed to C, which is recorded, the title of C will prevail over a subsequent execution lien of a creditor of B, the original grantee.²

§ 303. Ground upon which these decisions are placed.—The principle upon which it is sought to support these decisions referred to in the preceding section is that briefly stated by Richardson, C. J., in an early case in New Hampshire: "It is apprehended that in these cases the canceling of the deed operates like a reconveyance, but that it is not in fact to be considered as such. The true ground on which these decisions are to be supported is, that the grantee having voluntarily, and without any misapprehension or mistake, consented to the destruction of the deed with a view to revest the title, neither he nor any other person claiming by a title subsequently derived from him is to be permitted to show the contents of the deeds so destroyed by parol evidence. So that, in

¹ *Commonwealth v. Dudley*, 10 Mass. 402. This decision, however, is criticised in a note appended by the reporter.

² *Holbrook v. Tirrell*, 9 Pick. 105. And see *Marshall v. Fisk*, 6 Mass. 24; 4 Am. Dec. 76; *Hall v. McDuff*, 24 Me. 311; *Steel v. Steel*, 4 Allen, 417; *Howe v. Wilder*, 11 Gray, 267; *Lawrence v. Stratton*, 6 Cush. 163; *Speer v. Speer*, 7 Ind. 178; 63 Am. Dec. 418.

fact, there being no competent evidence that the land ever passed, the title is to be considered as having always remained in the grantor."¹ It will be seen that this rule in the States where it prevails is placed upon the ground of estoppel, and this is more fully declared in a subsequent case, in which it is said: "If the deed had been canceled with the intention of revesting the title in the grantor, it would have that effect by way of estoppel. The grantee having put it out of his power to produce the deed, the law will not allow him to introduce secondary evidence in violation of his undertaking, and to defeat the fair intention of the parties. Delivering the deed back into the hands of the grantor, with the intention of revesting the title, will have the same effect on the same principle. This puts it in the power of the grantor to cancel or destroy the deed, or what is in effect the same thing, to detain it from the grantee. In neither case can the grantee produce the deed, and the law will estop him in both cases to give secondary evidence to defeat the intended operation of his act in returning or annulling the deed. An agreement to cancel or to return is not sufficient; it is no better than an agreement to reconvey, and leaves the deeds in the hands of the grantee, so that the principle of estoppel cannot be applied."²

¹ *Farrar v. Farrar*, 4 N. H. 191, 195; 17 Am. Dec. 410.

² *Mussey v. Holt*, 24 N. H. (4 Fost.) 248, 252; 55 Am. Dec. 234; per *Perly, J.* In *Trull v. Skinner*, 17 Pick. 214, where an unrecorded defeasance had been surrendered, Chief Justice Shaw delivered the opinion of the court and said: "The court are of opinion that where an absolute deed is given, accompanied by a simultaneous instrument operating by way of defeasance, and afterward the parties, by fair mutual stipulations, agree that the defeasance shall be surrendered and canceled, with an intent to vest the estate unconditionally in the grantee, by force of the first deed, by such surrender and cancellation the estate becomes absolute in the mortgagee. The original conveyance stands unaffected in form and legal effect; it conveys an estate in fee; the only party who could even claim a right to deny it that operation, by engrafting a condition upon it, has voluntarily surrendered the only legal evidence by which that claim could be supported, and is thereby estopped from setting it up. Such cancellation does not operate by way of transfer, nor, strictly speaking, by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence,

§ 304. Redelivery without intention to revest title.

But even in the States where the peculiar rule we have just considered obtains, it is not every redelivery to the grantor that will have the effect of retransferring to him the title. The redelivery to him to have this operation must be made with the intention of revesting him with the title. Accordingly, in one of these States, where an unrecorded deed had been redelivered by the grantee to the grantor, who received it without any intent of revesting the title in him for his own benefit, but only that another deed might be substituted, and it appearing that no rights of third persons had intervened, and that the first deed would not impair any right intended to be given to the grantor by the redelivery, it was held that the grantee was not estopped from showing the existence and contents of the first deed.¹

by which alone the claim could be supported, like the cancellation of an unregistered deed, and a conveyance by the first grantor to a third person without notice. The cancellation reconveys no interest to the grantor, and yet, taken together, such cancellation and conveyance to a third person make a good title to the latter by operation of law. It gives a *seisin de facto*, a conveyance by deed duly registered being to many purposes equivalent to livery of seisin (*Higbie v. Rice*, 5 Mass. 352; 4 Am. Dec. 63); it is good against the grantor and his heirs by force of the second deed, and it is good against the first grantee, and all claiming under him, by force of the registry acts."

¹ *Bank v. Eastman*, 44 N. H. 431. Say the court, per Bartlett, J: "It is well settled that the redelivery of an unrecorded deed for cancellation to the grantor by the grantee, does not operate as a reconveyance; but it will under certain circumstances estop the grantee from making proof of the deed so delivered up. However, the destruction of a deed by a party does not in all cases preclude him from showing its contents: *Riggs v. Taylor*, 9 Wheat. 483; 2 C. & H.'s notes. Phill. Ev. 406. Where an unrecorded deed has been canceled or redelivered to the grantor by the grantee with the intention of revesting the title, the grantee cannot produce the deed, and the law will estop him in both cases to give secondary evidence to defeat the intended operation of his act in returning or annulling the deed: *Mussey v. Holt*, 24 N. H. 252; 55 Am. Dec. 234; *Farrar v. Farrar*, 4 N. H. 195; 17 Am. Dec. 410; *Dodge v. Dodge*, 33 N. H. 495. Here the deed was redelivered, not with the intent that the land should become the grantor's, but merely that another deed might be substituted. The intention was not to revest the title in Clark to his own use, but only, if at all, that it might at the same instant inure to the benefit of Aldrich by virtue of the deed then or already executed to

§ 305. Comments on these decisions.—The rule that is recognized in Massachusetts, Maine, and New Hampshire, concerning the effect of a redelivery of a deed to the grantor, is confined to cases where the deed has not been recorded. Where the deed has been recorded, the rule seems to be universal that a redelivery or cancellation of the deed can have no effect upon the title. These decisions, however, are confined to but a few States, and it is obvious that they must in a measure conflict with the provisions of the statute of frauds. If the rule that the cancellation of a deed or its redelivery to the grantor would operate to revest the title were adopted, it would permit the perpetration of the frauds which it was the design of the statute to prevent. The deed might be redelivered to the grantor for many other purposes than that of a retransfer of title. As in the cases cited in the following section, the deed might be returned for the purpose of correction or acknowledgment. Resort would have to be had to parol evidence in case of controversy, to determine the intention with which the redelivery was made. These decisions have frequently been referred to in other States, but always with disapproval. And as said by Mr. Justice Compton, in a case in Arkansas: "It would not be easy to maintain the soundness of these decisions upon principle."¹

§ 306. Redelivery to the grantor for correction, acknowledgment, etc.—Where a deed had been delivered, and afterward, before it was recorded, the grantee intrusted it to the grantor for the purpose of having certain informalities in it corrected, the grantor, on refus-

him: See *Crocker v. Pierce*, 31 Me. 177; *Hall v. McDuff*, 24 Me. 312. The good faith of this transaction is not impeached, the rights of third parties have not intervened (*Palmer v. Jenness*, Rockingham, December Term, 1862), and proof of the first deed in the present case would not defeat or impair any right intended to be given to Clark by the surrender: See *Lawrence v. Lawrence*, 42 N. H. 112. As there was no estoppel to show the deed, proof of it was properly admitted, and it showed title in Aldrich from its date as against all having notice of it."

¹ In *Strawn v. Norris*, 21 Ark. 80, 82.

ing to return it, was decreed to execute the trust reposed in him by returning the deed, or in case of its destruction, to give another deed for the premises.¹ The return of a deed after its delivery to the grantor for safekeeping during the grantee's minority or expected absence, does not negative its previous delivery, or destroy its effect as a conveyance of title.² Nor will the redelivery to the grantor for the purpose of procuring his acknowledgment invalidate the prior delivery.³ Where a grantor, having delivered a deed, receives it back for the purpose of obtaining a relinquishment of dower by his wife, the title has passed by the first delivery, and, notwithstanding the non-return of the deed, is vested in the grantee.⁴ But equity would have no jurisdiction in a case of this kind, unless the bill alleged that the deed is secreted or withheld, so that it cannot be replevied.⁵ A verbal contract was made for the purchase of land, and both the vendor and vendee went to the office of an attorney to have the deed prepared. The owner signed the deed and delivered it to the grantee. The latter handed it back to the grantor for acknowledgment, and they both attempted to find an officer to take the acknowledgment. The note for the purchase money had previously been delivered to the grantor, but he refused subsequently to acknowledge the deed. It was held that these acts constituted a valid delivery.⁶ Where a condition is solely for the benefit of the grantee,

¹ *Albert v. Burbank*, 25 N. J. Eq. (10 Green), 404.

² *Hart v. Rust*, 46 Tex. 556. See, also, *Towery v. Henderson*, 60 Tex. 291; *Wallace v. Berdell*, 97 N. Y. 13; *Hargrave v. Melbourne*, 86 Ala. 270; *Otis v. Spencer*, 102 Ill. 622; 40 Am. Rep. 617; *Thomas v. Groesbeck*, 40 Tex. 530.

³ *Rootes v. Holliday*, 6 Munf. 251.

⁴ *Brooks v. Isbell*, 22 Ark. 488. Where a grantor, through the misrepresentation of the grantee, has executed a deed for the same land, whereby he has become liable on the covenant of warranty in the first deed to a third person, equity will grant him relief by canceling the second deed: *Strawn v. Norris*, 21 Ark. 80.

⁵ *Travis v. Tyler*, 7 Gray, 146.

⁶ *Towery v. Henderson*, 60 Tex. 291. Where a deed has become effective as a transfer of real estate by delivery and registration, it cannot be made to embrace new property by changing the description. The

as where a deed is delivered to him with the understanding that the grantor's wife shall also afterward join in the execution, the grantee may waive the provision and the delivery becomes complete.¹ Where a grantor having executed a deed to his intended wife, hands it to her, and she, after some conversation relating to the deed, gives it back to him for the purpose of having it recorded, there is a sufficient delivery.²

§ 307. Delivery to a married woman.—At common law, it was essential that a husband should give his assent to a conveyance made to his wife. If a deed was made to her and he dissented it was void as to her.³ If the husband, however, gave his express assent to the deed, it is said that the wife or her heirs might after the husband's death waive the deed.⁴ But a verbal disclaimer on her part, after his death, where a grant was made to husband and wife, and he had given his assent, would not avoid the deed.⁵

§ 308. Whether delivery is a question of law or fact. The question of delivery is a mixed one of law and fact. What amounts to a final delivery and acceptance is a question of law, but it is a question of fact for the jury whether the facts exist which constitute such delivery and acceptance.⁶ But the question of delivery or nondelivery,

execution and acknowledgment of the original deed are not continued in existence as to such new property, but the deed should be re-executed and redelivered: *Moelle v. Sherwood*, 148 U. S. 21.

¹ *Brittain v. Work*, 13 Neb. 347.

² *Otis v. Spencer*, 102 Ill. 622; 40 Am. Rep. 617.

³ *Wood on Conveyancing*, 240; *Melvin v. Proprietors, etc.*, 16 Pick. 167; *Whelphdale's case*, 5 Rep. 119; *Butler v. Baker's case*, 3 Rep. 29; 3 Wash. Real Prop. (4th ed.) 297.

⁴ *Co. Litt.* 3 a.

⁵ 1 *Wood on Conveyancing*, 240; 3 Wash. Real Prop. (4th ed.) 297.

⁶ *Earle v. Earle*, 20 N. J. L. (1 Spenc.) 347; *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726. The delivery of a deed is a question of fact: *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Gorham v. Meacham*, 63 Vt. 231; 22 Atl. Rep. 572; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Burke v. Adams*, 80 Mo. 504; 50 Am. Rep. 510; *Standiford v. Standiford*, 97 Mo. 231; *Crowder v. Searcy*, 103 Mo. 97; *Walker*

while frequently of a mixed character, partly of law and partly of fact, yet in practice is generally one of fact only.¹ "The question, what constitutes a delivery of a deed, has been much discussed. It is much a question for the jury in each particular case."² But in a case in Vermont, it was said to be a question of fact purely. "The delivery of a deed, either as an escrow or absolutely, is an act including *intent*. It may be by words, without act, by an unequivocal act only, or by both combined. Hence, it is always a question of fact, resting *in pais*, to be found by a jury, under proper instructions of the court."³ And where a deed was not delivered at the time of its

v. Walker, 42 Ill. 311; 89 Am. Dec. 445; *Blake v. Fash*, 44 Ill. 302; *Otis v. Spencer*, 102 Ill. 622; 40 Am. Rep. 617; *Whitman v. Henneberry*, 73 Ill. 1^o *Price v. Hudson*, 125 Ill. 284; *Bryan v. Walsh*, 7 Ill. 557; *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212; *Rountree v. Smith*, 152 Ill. 493; *Benneson v. Aiken*, 102 Ill. 284; 40 Am. Rep. 592; *Fair v. Smith*, 14 Or., 82; 58 Am. Rep. 281; *Flint v. Phipps*, 16 Or. 437; *McLure v. Colclough*, 17 Ala. 89; *Simmons v. Simmons*, 78 Ala. 365; *Elsberry v. Boykin*, 65 Ala. 336; *Devereux v. McMahon*, 108 N. C. 134; *Waddell v. Hewitt*, 1 Ired. Eq. 475; *Welch v. Sackett*, 12 Wis. 243; *Bogie v. Bogie*, 35 Wis. 659; *Porter v. Cole*, 4 Me. 20; *Hatch v. Bates*, 54 Me. 136; *Brown v. Brown*, 66 Me. 316; *Hill v. McNichol*, 80 Me. 209; *Somers v. Pumphrey*, 24 Ind. 231; *Burkholder v. Casad*, 47 Ind. 418; *Vaughan v. Gorman*, 94 Ind. 11; *Stewart v. Redditt*, 3 Md. 67; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Crawford v. Bertholf*, 1 N. J. Eq. 458; *Pennsylvania Co. v. Dovey*, 64 Pa. St. 260; *Dayton v. Newman*, 19 Pa. St. 194; *Jackson v. Phipps*, 12 Johns. 418.

¹ *Hurlburt v. Wheeler*, 40 N. H. 73. And, see, *Parker v. Dustin*, 22 N. H. 424; *Warren v. Swett*, 31 N. H. 332; *Ela v. Kimball*, 30 N. H. 133; *Hannah v. Swarner*, 8 Watts, 9; 34 Am. Dec. 442. In *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 504, Commissioner Phillips said: "What constitutes a delivery of a deed is often a mixed question of law and fact. An arbitrary rule ought not to be laid down. Each case must stand more or less on its peculiar facts. The intent to convey is evidenced by the fact of making out and duly executing a deed. The delivery may be evidenced by any act of the grantor by which the control or dominion or use of the deed is made available to the grantee." Where the facts are disputed the intention to deliver and time of delivery are to be determined by the jury, and only where it is a positive inference of law can the court decide that there was a delivery: *Hunt v. Swayze*, 55 N. J. L. 33; 25 Atl. Rep. 850. See, also, *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188.

² *Dearmond v. Dearmond*, 10 Ind. 191, 194.

³ *Lindsay v. Lindsay*, 11 Vt. 621, 626, per Collamer, J. And see *Hastings v. Vaughn*, 5 Cal. 315.

signature, but deposited in the hands of a third person, it is competent for a jury to infer from circumstantial evidence that the deed was subsequently delivered by the grantor to the grantee.¹

§ 309. Deed taking effect as a will.—In some instances where an instrument has been executed as a deed, and purporting to be such, but was invalid because to take effect at the death of the grantor, operation has been given to it by considering it a testamentary disposition of the grantor's estate.² Thus, a father made an instrument in the form of a deed to his son, which contained a clause that it was "in no way to take effect until the death of the grantor," and that the grantor was to have "the entire use and possession of the land during his natural life." The court held that this was a testamentary instrument, and therefore revocable. Woodward, C. J., who delivered the opinion of the court, said: "As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is, that, whatever the

¹ *Fellows v. Fellows*, 37 N. H. 75. Though an instrument may be in the form of a deed, yet, if it may be revoked at will, and is not to take effect until the maker's death, it may be treated as a will: *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751. There can be no middle ground, when considering whether an instrument purporting to convey real estate is a deed or a will. It must be one or the other: *Burlington University v. Barrett*, 22 Iowa, 60; 92 Am. Dec. 376. When, from the face of an instrument, it is doubtful whether the maker of an instrument intended it to operate as a deed or a will, it is proper in addition to ascertain the intention of the maker, to receive evidence of how he really considered it himself: *Robertson v. Dunn*, 2 Murph. 133; 5 Am. Dec. 525. See, for other decisions bearing on this point, *Simon v. Wildt*, 84 Ky. 157; *Hileman v. Bouslaugh*, 13 Pa. St. 344; 53 Am. Dec. 474; *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28. And, see, also, §§ 854 and 983, *post*.

² *Gilman v. Mustin*, 42 Ala. 365; *Mosser v. Mosser's Executor*, 32 Ala. 551; *Shepherd v. Nabors*, 6 Ala. 631; *Dunn v. Bank of Mobile*, 2 Ala. 152; *Carey v. Dennis*, 13 Md. 1; *Hall v. Bragg*, 28 Ga. 330; *Symmes v. Arnold*, 10 Ga. 506; *Millican v. Millican*, 24 Tex. 426; *Walker v. Jones*, 23 Ala. 448; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159; *Dudley v. Mallery*, 4 Ga. 52; *Carlton v. Cameron*, 54 Tex. 72; 38 Am. Rep. 620; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235.

form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their words."¹ But as it is now generally required that a will shall be attested by witnesses, these decisions can perhaps have little application except in cases where the instrument is wholly in the handwriting of the grantor, in which case it might be an olographic will, if otherwise complying with the statutes relating to this class of wills.²

¹ *Turner v. Scott*, 51 Pa. St. 126, 134. And see, generally, *Ingraham v. Porter*, 4 McCord, 198; *Jacks v. Henderson*, 1 Desaus. Eq. 543; *Wheeler v. Durant*, 3 Rich. Eq. 452; *Gage v. Gage*, 12 N. H. 371; *Stewart v. Stewart*, 5 Conn. 317; *Allison v. Allison*, 4 Hawks, 141; *Wagner v. McDonald*, 2 Har. & J. 346; *Herrington v. Bradford*, 1 Miss. 520; *Watkins v. Dean*, 10 Yerg. 321; 31 Am. Dec. 583; *Henderson v. Farbridge*, 1 Russ. 479; *Green v. Proude*, 3 Keb. 310; s. c. 1 Mod. 117; *Peacock v. Monk*, 1 Ves. 127; *Habergham v. Vincent*, 2 Ves. Jr. 204. But it is held that, although the instrument may be wholly inoperative as a deed, it cannot be admitted to probate as a will, when it was clearly evident that it was the intention of the maker that the instrument should operate as a deed: *Edwards v. Smith*, 35 Miss. 197. And see *Wales v. Ward*, 2 Swan. 648; *Fitzgerald v. Goff*, 99 Ind. 28; *Swails v. Bushart*, 2 Head, 561; *Stevenson v. Huddleson*, 13 Mon. B. 299; *Hazleton v. Reed*, 46 Kan. 73; 26 Am. Rep. 86, and cases cited.

² But these wills are not recognized in all the States. Among some of the instances in which informal documents have been held to be wills may be cited the case of *Clarke v. Ransom*, 50 Cal. 595, where the following instrument, properly dated, was held to be a will: "Dear Old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon." The following was held to be a will: "Mrs. Sophie Loper is my heiress. G. Ehrenberg": *Succession of Ehrenberg*, 21 La. An. 280; 99 Am. Dec. 729. So was the following: "It is my wish and desire that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description. David Outlaw": *Outlaw v. Hurale*, 1 Jones (N. C.), 150. The same instrument may be partly a deed and partly a will: *Robinson v. Schly*, 6 Ga. 515; *Jacks v. Henderson*, 1 Desaus. Eq. 543. But where it is sought to have an informal paper declared to be a will, it must be proven that it is the act of the deceased, and that it was executed *animo testandi*: *Collins v. Townley*, 6 Green, C. E., 353; *Combs v. Jolly*, 2 Green Ch. 625.

§ 309 a. Intention of maker in determining whether a deed or will.—The intention of the maker when it can be ascertained in accordance with the rules of evidence may be a controlling factor in determining whether an instrument shall operate as a deed or a will. If it was the intention of the maker that no interest should vest before his death, the instrument will be regarded as a will.¹ The court held that the following instrument was a nondescript, which, according to circumstances, might be pronounced a deed or a will: "These presents show that, in consideration of the love and affection I have to Julia M. Hall, I do now here give and deliver to her the following property [describing it], together with all the tenements and hereditaments thereunto appertaining, all of which I now hold and possess. But I do hereby reserve the use, control, and consumption of the same to myself for and during my natural life; and this is done in part to do away with all need or necessity of taking out letters of administration after my death." The instrument was signed and attested by two subscribing witnesses.² An instrument may be partly a deed and partly a will.³ A deed is not converted into a will because it states that it is not to go into effect until after the grantor's death.⁴ An instrument which grants certain land to the husband of the maker for life, and thereafter to her child or children, is a deed, and is not testamentary in its character.⁵ An instrument does not become a will because it contains a clause that it is not to take effect until the grantor's death.⁶ A father conveyed land to his daughter, reserving "to his own use and enjoyment the

And see *Anderson v. Prior*, 18 Miss. 620; *Frew v. Clarke*, 80 Pa. St. 170; *Brunson v. King*, 2 Hill Ch. 483; *Stein v. North*, 3 Yeates, 324; *Winch v. Brutton*, 8 Jur. 1086.

¹ *Simon v. Wildt*, 84 Ky. 157.

² *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28.

³ *Burlington University v. Barrett*, 22 I. wa, 60; 92 Am. Dec. 376.
And see *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751.

⁴ *Seals v. Pierce, Little & Co.*, 83 Ga. 787; 20 Am. St. Rep. 344.

⁵ *Kaufman v. Ehrlich*, 94 Ga. 159.

⁶ *Wilson v. Carrico*, 140 Ind. 533; 49 Am. St. Rep. 212.

full interest and estate in the above-described property, the rents, issues, and profits thereof, for and during the time of his natural life, and providing that, if his wife should "survive him, then, at his death, she shall have for her own use the full right, title, and estate in the undivided one-half of the whole of the above-described properties, or one-half of the rents, issues, and profits thereof, for and during her natural life." It was held that the instrument was a deed, and vested a present interest in the grantee.¹ An instrument properly signed, attested, delivered, and recorded was held to be a deed, and not a will, which read: "I do at and after my death give to the said O. and W., their heirs and assigns, jointly, all the remainder (after the one hundred acres to E.) of the land that my said deceased husband died seised of; that is, I now give the last above-described lands to said O. and W., only reserving my life estate in the same."² Where a deed is executed, but not delivered, in the lifetime of the grantor, purporting to "grant, bargain, sell, and convey" to two nieces, for love and affection, an undivided half of certain property, and to another the other undivided half, in consideration of personal services rendered, and to be rendered, by him, and containing the clause, "but in no event is this deed to go into effect until after my death," it is testamentary in its character.³ Where a husband, on his deathbed, executed an instrument, in the form of a deed, conveying all his property to his wife, signed, sealed, and acknowledged it before a notary, who was in attendance at his request, and delivered it to a physician, with instructions that it should be kept for his wife until his death, and then recorded, it is a gift by deed, and not an attempted testamentary disposition of the property. The delivery for the use of the wife was sufficient.⁴ A deed, otherwise in the usual form, does not become a deed because it provides that it is not to take

¹ *Knowlson v. Fleming*, 165 Pa. St. 10.

² *Worley v. Daniel*, 90 Ga. 650.

³ *Donald v. Nesbitt*, 89 Ga. 290.

⁴ *Deifendorf v. Deifendorf*, 132 N. Y. 100.

effect until after the grantor's death.¹ Where an instrument which, on its face, is a deed of gift, but, owing to want of delivery, is inoperative, it cannot be admitted to probate as a will, in the absence of evidence showing that a testamentary disposition was intended.² An instrument was held to be a will, where two persons executed an instrument "covenanting and agreeing" that whoever of the two "may be the longest lived shall be the heir of the other."³ If an instrument conveys property to trustees, it will not be construed a will, for the reason that one of the trusts is for the use by the grantor of the property conveyed during his life.⁴ In a deed the grantor reserved "to himself a life estate in the tract of land herein and hereby conveyed to have, use, occupy, and enjoy the same during his natural life, and to take and enjoy the rents, issues, and profits of the same during his life only," it was held not to be testamentary.⁵ A power of revocation contained in the instrument will not destroy its character as a deed or convert it into a will.⁶

¹ *Jenkins v. Adcock*, 5 Tex. Civ. App. 466. See, for other cases where this question has arisen, *Owen v. Smith*, 91 Ga. 564; *Worley v. Daniel*, 90 Ga. 650; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40; 26 S. W. Rep. 759; *Wren v. Coffey* (Tex. Civ. App.), 26 S. W. Rep. 142; *Cates v. Cates*, 135 Ind. 272; *Bromley v. Mitchell*, 155 Mass. 509.

² *Estate of Skerrett*, 67 Cal. 585.

³ *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751.

⁴ *Cumming v. Cumming*, 3 Ga. 460.

⁵ *Williams v. Tolbert*, 66 Ga. 127. The court in this case refers to the cases of *Daniel v. Veal*, 32 Ga. 589, *Bass v. Bass*, 52 Ga. 531, and *Nichols v. Chandler*, 55 Ga. 369, on the same subject. Where a deed of gift was inoperative for want of delivery, it was held, in Texas, that it could operate as a will, and would transfer so much of the estate as the grantor could dispose of by will: *Crain v. Crain*, 21 Tex. 790. An instrument conveying land and personal property "upon the following conditions, however, and none other, that I reserve the right to alter, change, or entirely abolish this deed, if I so desire, during my life, and that I retain all of the said property during my life, and have the control of the same, and that this deed do not take effect until after my death, and that, after my death, my wife pay all of my debts, and the remainder over after paying my debts to be hers and her assigns forever," was considered testamentary: *Cunningham v. Davis*, 62 Miss. 366. See the late cases and extensive notes in the American State Reports: *Wilson v. Carrico*, 140 Ind. 533; 49 Am. St. Rep. 213; *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176. See, also, for other cases, *Moye v. Kittrell*, 29

⁶ *Nichols v. Emery*, 109 Cal. 322.

§ 310. Complete execution before delivery essential.—

The deed must be completely executed before the delivery of it can be effectual to pass the title.¹ Therefore, a bill in equity may, by a married woman who has signed and sealed a blank form of a deed, giving parol authority to fill it up, so as to convey her rights of dower and homestead in the land of her husband, be maintained after the instrument has been filled up in her absence, and signed and delivered by her husband, to compel the person whom the deed names as grantee to reconvey her estate in the premises. Her right to relief, it seems, is not affected by the fact that she gave her assent when informed that the deed had been filled up in conformity to her authority, or by the fact that the grantee, relying upon the validity of the instrument, has furnished supplies to the family, or rendered services to her husband.² Mr. Justice Chap-

Ga. 677; *Boling v. Boling*, 22 Ala. 326; *Cover v. Stein*, 67 Md. 499. If an instrument passes no present interest, is not to become effective till the maker's death, and may be revoked at pleasure, it is testamentary, although in the form of a deed: *In re Lautenschlager*, 80 Mich. 285; *Frew v. Clarke*, 80 Pa. St. 170; *Daniel v. Hill*, 52 Ala. 430; *Jordan v. Jordan*, 65 Ala. 301; *Crocker v. Smith*, 94 Ala. 295; *Gillham v. Mustin*, 42 Ala. 365; *Rose v. Quick*, 30 Pa. St. 225; *Sperber v. Basler*, 66 Ga. 317; *Reed v. Hazleton*, 37 Kan. 321; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159; *Miller v. Holt*, 68 Mo. 584; *Johnson v. Yancey*, 20 Ga. 707; 65 Am. Dec. 646; *Hall v. Bragg*, 28 Ga. 330; *Carey v. Dennis*, 13 Md. 1; *Millican v. Millican*, 24 Tex. 426. And see, generally, *Sharp v. Hall*, 86 Ala. 110; *Massey v. Huntington*, 118 Ill. 80; *Hinckle v. Landis*, 131 Pa. St. 573; *Castor v. Jones*, 86 Ind. 289; *Hart v. Rust*, 46 Tex. 556; *Hall v. Burkham*, 59 Ala. 349.

¹ *Burns v. Lynde*, 6 Allen, 305; *Williams v. Sprigg*, 6 Ohio St. 585; *McKee v. Hicks*, 2 Dev. 379; *Brevard v. Neely*, 34 Tenn. (2 Sneed), 164. See *Hicks v. Goode*, 12 Leigh, 479; 37 Am. Dec. 677. In *Shep. Touch. 54*, it is said: "Every deed well made must be written; i. e., the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do there withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This is the rule in England: *Master v. Miller*, 1 Anstr. 228; *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Davidson v. Cooper*, 11 Mees. & W. 793; the earlier case of *Texiora v. Evans*, tried at *nisi prius*, countenancing a different doctrine, being overruled. But see *Wiley v. Moor*, 17 Serg. & R. 438; 17 Am. Dec. 696; *Wooley v. Constant*, 4 Johns. 54; 4 Am. Dec. 246; *Ex parte Kerwin*, 8 Cowen, 118; *Parker v. Hill*, 8 Met. 447; *Adams v. Frye*, 3 Met. 103.

² *Burns v. Lynde*, 6 Allen, 305.

man reviews the authorities in Massachusetts and elsewhere upon this question, and observes: "When the paper was delivered, it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing or sealing. If such an act can be done under a parol agreement, in the absence of the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by deed. We do not think that such a change of the ancient common law has been made in this commonwealth, or that the policy of our legislation favors it, or that sound policy would dictate such a change. Our statutes which provide for the conveyance of real estate by deed, acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds, are evidently based on the ancient doctrines of the common law respecting the execution of deeds; and a valuable and important purpose which these doctrines still serve is to guard against mistakes which are likely to arise out of verbal arrangements from misunderstandings and defect of memory, even where there is no fraud. . . . If this method of executing deeds is sanctioned, it will follow that, though the defendant has a regularly executed deed, yet it remains to be settled by parol evidence whether he ought to have been the grantee, what land should have been described, whether the deed should have been absolute or conditional, and, if conditional, what the terms of the condition should have been. To leave titles to real estate subject to such disputes would subject them to great and needless insecurity."¹

¹ Burns v. Lynde, *supra*. See, also, Hudson v. Revett, 5 Bing. 368; Eagleton v. Gutteridge, 11 Mees. & W. 466; Smith v. Crooker, 5 Mass. 538. The execution of a deed includes its delivery; hence, where a probate judge adjudicates that the execution of a deed has been duly proved, this is a judicial determination of the fact of delivery; and is not subject to collateral impeachment; Redman v. Graham, 80 N. C. 231. For a valuable collection of authorities of what constitutes delivery, see Vaughan v. Goodman, 94 Ind. 191.

§ 311. **Right to rent.**—The right to receive rents is one of the appurtenances of an estate. Where the land conveyed is under lease, the grantee, after the execution and delivery of the deed, is entitled to the accruing rent, unless such rent or the right to collect it is reserved to the grantor. But it is not necessary that this reservation by the grantor should appear upon the face of the deed.²

² Neil v. Chessen, 15 Bradw. (Ill.) 266.

CHAPTER XIII.

DELIVERY IN ESCROW.

- § 312. Definition of an escrow.
- § 313. Deed must be executed—Delivery the only difference between deed and escrow.
- § 313 a. Awaiting settlement of title to land.
- § 314. Delivery to the grantee cannot operate as an escrow.
- § 315. Conditional deed.
- § 316. Delivery to grantee's agent.
- § 317. Deed placed in grantee's hand for transmission to another.
- § 317 a. Notice of deed in escrow.
- § 318. Some condition to be performed before delivery.
- § 319. Whether an escrow or a present deed.
- § 320. Materiality of distinction.
- § 321. Grantee must perform condition before entitled to delivery.
- § 322. Escrow delivered without authority or obtained fraudulently passes no title.
- § 323. Legal title until performance of condition is in grantor.
- § 324. Not an escrow if grantor retains the right of control.
- § 325. Voluntary conveyance.
- § 326. Comments.
- § 327. Enforcing delivery of deed.
- § 328. At what time title passes.
- § 329. Intention of parties.
- § 330. Lien of attachment or judgment upon land prior to second delivery.
- § 331. The necessity of an actual second delivery.
- § 332. No particular form of delivery required.
- § 333. Condition must be one to be performed by grantee.
- § 333 a. Delivery after grantor's death.
- § 333 b. Death of party to action for specific performance.

§ 312. Definition of an escrow.—A delivery may be made to a third person conditional on the performance of an act or the happening of an event, whereupon it is to be delivered to the grantee. Such delivery to a third person is called an escrow. "The delivery of a deed as an escrow is said to be when one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then be delivered to him to

whom the deed is made to take effect as his deed. And so a man may deliver a deed, and such delivery is good. But in this case, two cautions must be heeded: *first*, that the form of the words used in the delivery of a deed in this manner be apt and proper; *second*, that the deed be delivered to one who is a stranger to it, and not to the party himself to whom it is made.”¹ Another definition given is: “A writing sealed and delivered to a stranger (i. e., a person not a party to it), to be held by him until certain conditions be performed, and then to be delivered to take effect as a deed. It is said that to make the writing an escrow, the word ‘escrow’ must be used in delivering it, but whether this is so at the present day is doubtful.”²

§ 313. Deed must be executed—Delivery the only difference between deed and escrow.—The only particular in which a deed differs from an escrow is in its delivery. In all other respects both are the same. It follows, therefore, that the deed must be complete, every act required to be performed in order that the present title may pass to the grantee must be performed, and the deed must be in a condition to be delivered to the grantee upon the performance of the stipulated condition. Not only are sufficient parties, a proper subject-matter, and a consideration required, but also an actual contract by the parties. In other words, the grantor must have sold and the grantee must have purchased the land; for a proposal to sell or a proposal to buy, although it may

¹ Shep. Touch. 58.

² Rapalje & Lawrence Law Dict. tit. Escrow. For other definitions, see *Raymond v. Smith*, 5 Conn. 559; *James v. Vanderheyden*, 1 Paige, 387. To constitute a deed an escrow, it is not essential that it should be expressly so declared, as it will be an escrow whenever delivered to another to be delivered to the grantee, awaiting the performance of a condition or the occurrence of an event: *Gaston v. Portland*, 16 Or. 255; *Bank v. Bailhache*, 65 Cal. 327; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *Jackson v. Sheldon*, 22 Me. 569; *Evans v. Gibbs*, 6 Humph. 405; *Webster v. King's Co. Trust Co.*, 145 N. Y. 275; *State Bank v. Evans*, 15 N. J. L. 155; 28 Am. Dec. 400; *White v. Bailey*, 14 Conn. 271.

be stated in writing, is not sufficient. An actual contract of sale on one side, and of purchase on the other, is just as requisite as the execution of the instrument by the grantor to make it an escrow. The minds of the parties must have met, the terms must have been assented to, and both parties must have agreed upon the instrument as a conveyance of the land, which would then have been delivered by the grantor and received by the grantee, were it not for the agreement that it should be deposited with some third person to be retained by him until the performance of a specified condition by the grantee, and to be delivered thereupon to the grantee. Though the instrument executed by the proposed grantor is in form a deed, yet until both parties have definitely assented to the contract, it is neither a deed nor an escrow; and as long as the proposals for sale or purchase are pending, it makes no difference whether the nominal grantor retains possession of the instrument, or it is placed in the hands of a third person. In either case it is ineffectual as a deed or an escrow.¹

§ 313 a. Awaiting settlement of title to land.—It is essential to a valid delivery in escrow that there should be an actual contract of sale on one side, and of purchase on the other, to which both parties have definitely given their assent. If a deed is deposited with a third person, by one of the parties to a contract, for the exchange of lands to be delivered to the other contracting party as soon as the question of title to the land shall have been determined satisfactorily to the contracting parties, the delivery cannot be considered as a valid delivery in escrow.² The custodian of the deed in such a case is a mere depositary subject to the orders of the grantor.³

¹ *Fitch v. Bunch*, 30 Cal. 209; *Hubback v. Ross*, 96 Cal. 426; *Evans v. Gibbs*, 6 Humph. 405.

² *Miller v. Sears*, 91 Cal. 282; 25 Am. St. Rep. 176. As to the effect of depositing a deed with an agent to await the arrival of money from the grantee, see *Wier v. Batdorf*, 24 Neb. 83.

³ See § 273 a, *ante*.

§ 314. Delivery to the grantee cannot operate as an escrow.—A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself,¹ and it will vest the title in him, though this may be contrary to the intention of the parties.² One of the

¹ *Williams v. Higgins*, 69 Ala. 517; *McCann v. Atherton*, 106 Ill. 31; *Fairbanks v. Metcalf*, 8 Mass. 230; *Ward v. Lewis*, 4 Pick. 520; *Moss v. Riddle*, 5 Cranch, 351; *Worrall v. Munn*, 5 N. Y. (1 Seld.) 229; 55 Am. Dec. 330; *Duncan v. Pope*, 47 Ga. 445; *Miller v. Fletcher*, 27 Gratt. 403; 21 Am. Rep. 356; *Blake v. Fash*, 44 Ill. 305; *Gilbert v. North American F. Ins. Co.*, 23 Wend. 43; 35 Am. Dec. 543; *Black v. Stevens*, 13 N. J. 458; *M. & Ind. Plank Road Co. v. Stevens*, 10 Ind. 1; *Herdman v. Bratten*, 2 Har. 396; *State v. Crisman*, 2 Ind. 126; *Graves v. Tucker*, 18 Miss. 9; *Jordan v. Pollock*, 14 Ga. 145; *Fuller v. Hollis*, 57 Ala. 435; *State v. Thatcher*, 41 N. J. L. 403; 32 Am. Rep. 225; *Brown v. Reynolds*, 5 Sneed, 639; *Brown v. State*, 18 Tex. App. 326; *Berry v. Anderson*, 22 Ind. 36; *State v. Potter*, 63 Mo. 212; 21 Am. Rep. 440; *Jones v. Shaw*, 67 Mo. 667; *Mossman v. Holcher*, 49 Mo. 87; *Truman v. McCollum*, 20 Wis. 360; *East Texas F. Ins. Co. v. Clarke*, 1 Tex. Civ. App. 238; *Lott v. Kaiser*, 61 Tex. 665; *Heffron v. Cunningham*, 76 Tex. 312; *Benoit v. Schneider*, 47 Ind. 13; *Foley v. Cowgill*, 5 Blackf. 18; 32 Am. Dec. 49; *Murray v. Kimball*, 10 Ind. App. 141; *Stewart v. Anderson*, 59 Ind. 375; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Berry v. Anderson*, 22 Ind. 36; *McAllister v. Mitchener*, 68 Miss. 672; *Fireman's Ins. Co. v. McMillan*, 29 Ala. 147; *Cherry v. Herring*, 83 Ala. 458; *Shelby v. Tardy*, 84 Ala. 327; *Williams v. Higgins*, 69 Ala. 517; *Hargrave v. Melbourne*, 86 Ala. 270; *Johnson v. Branch*, 11 Humph. 521; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; *Dawson v. Hall*, 2 Mich. 390; *Beers v. Beers*, 22 Mich. 42; *Watson v. Hurt*, 6 Gratt. 633; *Towner v. Lucas*, 13 Gratt. 705; *Fitch v. Bunch*, 30 Cal. 208; *Richmond v. Morford*, 4 Wash. St. 337; *Glenn v. Hill*, 11 Wash. St. 541; *Campbell v. Jones*, 52 Ark. 493; *Hubbard v. Greeley*, 84 Me. 340; 24 Atl. Rep. 799; *Day v. Lacasse*, 85 Me. 242; 27 Atl. Rep. 124; *Raymond v. Smith*, 5 Conn. 555; *Shoenberger v. Hackman*, 37 Pa. St. 87; *Haworth v. Norris*, 28 Fla. 763; 10 So. Rep. 18; *Loubat v. Kipp*, 9 Fla. 60; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359; *Resor v. Ohio & M. R. Co.*, 17 Ohio St. 139; *Gaston v. Portland*, 16 Or. 255; *Brittain v. Work*, 13 Neb. 347; *Gibson v. Partee*, 2 Dev. & B. 530; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235; *Blewett v. Front St. Ry. Co.*, 51 Fed. Rep. 625; 2 C. C. A. 415; 7 S. W. App. 285; *Stevenson v. Crapnell*, 114 Ill. 19; 28 N. E. Rep. 379; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; 11 N. E. Rep. 893; *Marshall Co. High School v. Iowa Evangelical Synod*, 28 Iowa, 360; *Carler v. Moulton*, 51 Kan. 9; 37 Am. St. Rep. 259. But see *Brackett v. Barney*, 28 N. Y. 333. The case of *Brackett v. Barney*, *supra*, was cited in *Minah Consolidated Min. Co. v. Briscoe*, 47 Fed. Rep. 276, which see.

² *Braman v. Bingham*, 26 N. Y. 483, 491; *Worrall v. Munn*, 5 N. Y.

grounds upon which this rule is based is that parol evidence is inadmissible to show that the deed was to take effect upon condition. "A deed," says Harris, J., "can only be delivered as an escrow to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not is a question of fact upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence. The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time."¹

§ 315. Conditional deed.—But this principle that a deed intended as an escrow cannot be delivered to the grantee is applicable, it is held in a late case in Virginia, only to the case of deeds which are upon their face complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties, and it has no application to deeds which show upon their face the necessity of the performance of something be-

(1 Seld.) 220; 55 Am. Dec. 330; *Gilbert v. N. A. F. Ins. Co.*, 23 Wend. 45; 55 Am. Dec. 543.

¹ In *Lawton v. Sager*, 11 Barb, 349, 351. But see *Bibb v. Reid*, 3 Ala. 88.

sides delivery to make, agreeably to the intention of the parties, competent and perfect contracts.¹

§ 316. **Delivery to grantee's agent.**—A delivery to the agent or attorney of the grantee has the same effect as a delivery to the grantee personally.² A deed so delivered cannot be an escrow.³ A delivery of a deed with the intention of passing the title, made to an officer of a corporation, is a delivery to the corporation itself, if it be done for the use and benefit of the corporation. But a deed may be delivered to an officer of a corporation, to take effect as an escrow upon the performance of a condition, as there is no such personal identity between a corporation and its officers as will prevent a delivery to the latter as an escrow.⁴ Where a perfectly executed deed

¹ *Wendlinger v. Smith*, 75 Va. 309; 40 Am. Rep. 727. See, also, *Shelby v. Tardy*, 84 Ala. 327; *Brackett v. Barney*, 28 N. Y. 333.

² This section was cited approvingly in *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37.

³ *Duncan v. Pope*, 47 Ga. 445; *Wight v. Shelby etc. R. R. Co.*, 16 B. Mon. (Ky.) 4; 63 Am. Dec. 522; *Pratt v. Holman*, 16 Vt. 530; *Stewart v. Anderson*, 59 Ind. 375; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Day v. Lacasse*, 85 Me. 242; *Cincinnati W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235; *Murray v. Kimball*, 10 Ind. 141; *Hubbard v. Greeley*, 84 Me. 340; *Price v. Pittsburgh Ft. W. & C. R. R. Co.*, 34 Ill. 13; *Deardorff v. Foresman*, 24 Ind. 481.

⁴ *Southern Life Ins. etc. Co. v. Cole*, 4 Fla. 359; *Bank of Healdsburg v. Bailhache*, 65 Cal. 326. See, also, *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37; *Price v. Pittsburgh Ft. W. & C. R. R. Co.*, 34 Ill. 13; *Cincinnati W. & Z. R. R. Co. v. Iliff*, 13 Ohio St. 235. In the former case the opinion of the court was delivered by Thompson, J., who said (p. 373): "The appellants, however, plant themselves upon an alleged delivery of the deeds to the Southern Life Insurance and Trust Company, its acceptance of them as valid instruments, and an alleged credit to Tooke, as conclusive of their right to the decree of foreclosure prayed for. And first, as to the delivery of the deeds: Delivery of a deed is a matter *in pais*, and there is no doubt that the possession of a deed by the grantee, acknowledged by the grantor for record, is evidence of delivery, but the authorities cited do not make it more than *prima facie* evidence of the fact. It is, even in a court of law, susceptible of explanation or rebuttal. The grantor may show that such possession is the result of fraud, mistake, or accident: 2 Greenl. Ev. § 297, and authorities cited in the margin. But what is the evidence of delivery in the case before us? On the part of the appellants, there is nothing more than the *prima facie* case made by the possession of the deeds. On the part of the respondent,

of release is delivered to a known agent of the releasee, it is in law a delivery to the principal, and it is immaterial by what verbal stipulations or conditions its delivery was accompanied, as to its operation *after* delivery, it will,

there is the express denial of the answer, which is responsive, not only to the allegations of the bill, but to the special interrogatory addressed to him. The explanation which he gives as to the manner in which the company became possessed of the deeds is perfectly consistent with the contract proved, of which the execution of the deeds was an integral part. The respondent executed the instruments and deposited them with the cashier or other officer of the company, at its office, the place where the execution of the contract was to be finally consummated, so far as the respondent was interested, to wit: The transfer of the shares, which to be full and perfect must be made on the books of the corporation, there to be ready for the final completion. It is said that delivery to an officer or servant of a corporation is delivery to the corporation. To this we assent, with the addition that such delivery is for the use and benefit of the corporation, and with intent to pass an absolute property or interest in the deed delivered, and the rule would be the same if the delivery should be made to a mere stranger. We do not think that there is such a personal identity between the corporation and its officers that a deed may not be placed in the hands of the latter as an escrow until the performance of some condition, etc. Whether there was any formal notification by words or not, at the time of the deposit or delivery to the officers of the company, that it was to operate as an escrow, is not, it seems, material. In *Bowker v. Burdekin*, 11 Mees. & W. 145, Parke, B., says: 'I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard's Touchstone, that in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words, but you are to look at all the facts attending the execution—to all that took place at the time, and to the result of the transaction; and, therefore, though it is in form an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow.' We find no sufficient proof of the delivery of the deeds in question. The presumption of a delivery, as an independent and substantive contract, is repelled, not only by the answer, but by the proof of the contract which was in fact made, and of which the deeds were but an integral part; a contract of which the company had full notice, for it was not an unimportant party thereto. It must be borne in mind that this court is now sitting as a court of equity, which regards not the circumstances or outward ceremonial, but the substance of the act, and, therefore, we think that if the respondent had entered the parlor of the company, the president and directors being there in session, and by the most formal act had delivered the deeds in question to the head of the corporation, stating the circumstances under which and to accomplish which they were executed, we should be compelled to regard it as a delivery, to take effect only on the final con-

notwithstanding, be operative from the time of its delivery. It is not, however, an inevitable conclusion that the mere delivery of manual possession is a valid delivery of the deed. If the acceptance of an agency from both parties will involve no violation of duty to either, the releasor may make the agent of the releasee his own agent for the purpose of holding the deed as an escrow, and returning it to him in case a stipulated condition is not performed. The rule that a delivery to an agent of the grantee is equivalent to a delivery to the grantee himself would not apply in such a case, because there is not that personal identity between the releasee and his agent, upon which the reason for the rule depends.¹ A grantor may make the agent of the grantee, it is conceded, his own agent for the purpose of holding the deed and returning it to him in case a condition agreed upon is not performed.²

§ 317. Deed placed in grantee's hand for transmission to another. — Where it was agreed between the parties that a deed should remain in the hands of a third person until the happening of a certain event, when it should be delivered over and take effect, it was held that the fact that it was left in the hands of the grantee, but solely for the purpose of transmission to such third per-

summation of the contract. In *Flagg v. Mann*, 2 Sum. 510, that learned jurist, Justice Story, says: Though there is a technical difficulty in the suggestion of the delivery of the deed to the grantee as an escrow, yet a court of equity will not govern itself exclusively by technical principles of law where the intentions of the parties will be thereby defeated. It requires, however, he says, clear evidence of what the intention is, and whether it will be so defeated; otherwise the rule of law must prevail. In this case we are perfectly satisfied of the intentions of the parties, and that if the possession of the deeds by the company be regarded as an absolute technical delivery, the intention of the party will be frustrated and defeated." See *Millership v. Brookes*, 5 Hurl. & N. 797.

¹ *Cincinnati, Wilmington etc. R. R. Co. v. Iliff*, 13 Ohio St. 235. See, also, *Southern L. Ins. Co. v. Cole*, 4 Fla. 359; *Price v. Pittsburgh H. W. & C. R. R. Co.*, 34 Ill. 13; *Watkins v. Nash*, L. R. 20 Eq. 262; *Weir v. Batdorf*, 24 Neb. 83.

² *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37.

son, did not cause the deed to take effect as an operative instrument.¹ But in the case cited, the deed at the time the point was raised was in the hands of the depositary. If the grantee had retained the possession of the deed, and claimed that its delivery to him was absolute, the rule that it could not be delivered to him, and held by him as an escrow, would apply. Parol evidence would not be admissible to show a condition attached to the delivery, and the delivery to him would necessarily be

¹ *Gilbert v. North America etc. Ins. Co.*, 23 Wend. 43; 35 Am. Dec. 543. And see *Jackson v. Shelden*, 22 Me. 569; *Brown v. Reynolds*, 37 Tenn. (5 Sneed), 639; *Simonton's Estate*, 4 Watts, 180; *Murray v. Stair*, 4 Barn. & C. 82; *Den v. Partee*, 2 Dey. & B. 530. In *Gilbert v. North America etc. Ins. Co.*, *supra*, Bronson, J., said for the court: "If the grantor do not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately, and without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery. This is one of the cases in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object. But this case does not come within the rule. There was no delivery of the deed, either upon condition or otherwise, to the grantee. The agreement of the party was, in substance, that the deed should be placed in the hands of Mr. Babcock [the depositary], until the controversy with White should be settled, and then, and not before, the conveyances should be delivered. It was not necessary that the word 'escrow' should be used in making this arrangement. The intention of the parties was sufficiently manifested without it: *Clark v. Gifford*, 10 Wend. 310. If Babcock had been present, and the conveyances had been handed to him at that time, there would have been no question about it, and although absent, if the deed had been sent to him, with the proper instructions, by the hand of a *third person*, it could not be maintained that this would amount to a delivery to the grantee. Now, what was done in this case? The deed, as well as the mortgage, was left in the hands of Nottingham *to be forwarded to Babcock*, the depositary. It was not put into the hands of the grantee to keep, *but merely as a mode of transmission to Babcock*, as was well said by the judge on the trial. There was neither any formal delivery, nor any intent that the grantee should take it as the deed of the grantor. Nottingham received it, not as *grantee*, but as the *agent* of the grantor for a special purpose; and I see no good reason why he could not execute that trust as well as a stranger. He did execute it with fidelity, and the deed still remains with the depositary agreed on by the parties."

absolute.¹ Where the deed has been actually placed by the grantee in the hands of the depositary, there can be no objection to considering it an escrow. The deed while in the hands of the grantee for the purpose of transmission to another, to be held in escrow, may be considered as *in transitu*, and when delivery has been really made to the depositary, as much effect should be given to the understanding and agreement of the parties as if the grantor had himself placed the deeds in the hands of the depositary, with instructions to deliver it to the grantee upon the performance of a condition.²

§ 317 a. Notice of deed in escrow.—Where a deed has been placed in the hands of a depositary to be de-

¹ *Braman v. Bingham*, 26 N. Y. 483, 491.

² See *Fairbanks v. Metcalf*, 8 Mass. 230. In that case, Sedgwick, J., said: "That the delivery of a deed should operate as an escrow, it is necessary that it should be made to a stranger, and not to the party; for if one make a deed, and deliver it to the party to whom it is made as an escrow, upon certain conditions, in such case, let the form of the words be whatever it may, the delivery is absolute, and the deed shall take effect presently as his deed, and the party to whom it is delivered is not bound to perform the condition; for *in traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur*. The question then is, whether from the facts appearing in this case, the delivery of the deed in 1806 was made to Woodward or to Adams. If to the former, it was an escrow; if to the latter, it was absolute, and the deed then took effect. There can be no doubt what the intention of the parties was. It was their intention and agreement that the deed should operate as an escrow. The deed was not at that time to become absolute. It was not *then* to go into the possession of Adams. But, on the contrary, it was to be placed in the hands of a third person, by him to be kept until an adjustment should be made between the parties, and a defeasance executed by Adams, or until further directions should be given by the parties. When, however, Metcalf sealed it, he delivered it into the hands of Adams; but it was immediately afterward, *in conformity to the understanding and agreement of the parties*, placed in the possession of Woodward. Now, the plain sense and justice of the case requires that the deed, while in the hands of Adams, should be considered as *in transitu* to the possession of Woodward—as much so as if words to that effect had been pronounced by Metcalf at the time. The agreement had been *previously* made, and subsequently the delivery in conformity to it; and I think that, according to the facts, Adams is to be considered merely the instrument or agent of Metcalf, to deliver the deed to Woodward, according to the intention and agreement of the parties, as an escrow."

livered after the grantor's death it may be shown that a mortgagee had notice at the time he received his mortgage of the execution of the deed and its deposit. The material element of a valid delivery in escrow under such circumstances is that the deed has absolutely passed beyond the grantor's control. The grantor's motive is the controlling fact, and that intention is to be gathered from all the circumstances attending the transaction.¹

§ 318. Some condition to be performed before delivery.—To give a deed the character of an escrow it is essential not only that it should be delivered to a third person, but that its delivery to the grantee should be dependent upon the occurrence of some event, or the performance of some condition. If, therefore, it be delivered to a third person, to be kept by him during the pleasure of the grantor, and subject to his order, it is not an escrow.² Where a deed is thus deposited with a third person, to be delivered to the grantee upon the order of the grantor, it is not an escrow, because it is deemed in law to be still in the grantor's possession. "There was nothing agreed to be done by or on the part of the grantee, as the condition upon the performance of which the deed was to become absolute, and to be delivered to him by the third person. It is the general rule that a deed delivered to a third person is viewed as an escrow only in case it is agreed that the deed is to be delivered to the grantee, upon the performance by him of the stipulated condition."³

§ 319. Whether an escrow or a present deed.—It is often difficult to determine, where a deed is not immediately delivered to the grantee after its execution, but is

¹ *Wittenbrock v. Cass*, 110 Cal. 1.

² *Loubat v. Kipp*, 9 Fla. 60; *Arnold v. Patrick*, 6 Paige, 310; *Carrick v. French*, 7 Humph. 459; *Johnson v. Branch*, 11 Humph. 521; *Ordinary of New Jersey v. Thatcher*, 41 N. J. L. 403; 32 Am. Rep. 225; *Evans v. Gibbs*, 6 Humph. 405; *Graves v. Tucker*, 18 Miss. 9.

³ *Fitch v. Bunch*, 30 Cal. 208, 213; *Miller v. Sears*, 91 Cal. 282; 25 Am. St. Rep. 176; *Hoyt v. McLagan*, 87 Iowa, 746.

placed in the hands of a third person, to be delivered by him at some time in the future to the grantee, whether it is to be deemed the deed of the grantor presently or an escrow. The determination of this question will depend upon the intent of the parties, and the words used and purposes expressed as indicative of that intention, rather than upon the name by which the parties may characterize the instrument. The distinction recognized by the cases seems to be this: If the payment of money or the performance of some other condition is the circumstance upon which the future delivery is to depend, the instrument is an escrow; but where the future delivery does not depend upon the performance of any condition, but it is deposited with a third person merely to await the lapse of time or the happening of some contingency, it will be deemed the grantor's deed presently.¹

§ 320. Materiality of distinction.—This distinction is material because if it be an escrow no title passes to the grantee until the second delivery, while if it be a present deed, the title upon the happening of the contingency, or upon the lapse of the specified time, passes by relation from the time the instrument was placed in the hands of the depositary or trustee. As the intent of the parties is the point to be ascertained, each case must be decided upon its own peculiar circumstances, upon the language employed, the situation of the parties, the objects to be

¹ *Hathaway v. Payne*, 34 N. Y. 92; *Foster v. Mansfield*, 3 Met. 412; 37 Am. Dec. 154; *Wheelwright v. Wheelwright*, 2 Mass. 454; 3 Am. Dec. 66; *Smiley v. Smiley*, 114 Ind. 258; *Regan v. Howe*, 121 Mass. 424; *McCalla v. Bane*, 45 Fed. Rep. 828; *Fairbanks v. Metcalf*, 8 Mass. 230; *Stewart v. Stewart*, 5 Conn. 317; *Jackson v. Sheldon*, 22 Me. 569; *Owen v. Williams*, 114 Ind. 179; *Goodpaster v. Leathers*, 123 Ind. 121; *Jones v. Swayze*, 42 N. J. L. 279; *Brown v. Austen*, 35 Barb. 341; *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375. But see *Stone v. Duvall*, 77 Ill. 475, where a delivery of this kind was considered rather to be an escrow. And see, also, generally, *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *Wallace v. Harris*, 32 Mich. 380; *Ball v. Foreman*, 37 Ohio St. 132; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235; *Crooks v. Crooks*, 34 Ohio St. 610; *Williams v. Schatz*, 42 Ohio St. 47; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592.

attained, and such other facts as may throw light upon the intention of the parties. In a case in New York, Potter, J., reviews the cases at some length, and, in delivering the opinion of the court, observes: "The cases can be multiplied, each varying from every other by some nice shade of difference upon the question whether in the present case the deed was an escrow in the hands of the depositary, or whether the depositary was made the trustee of the grantor. In the former case, a second delivery is generally required before the title passes; in the latter, the title passes at the instant of delivering the deed to the depositary. This, I think, is the true distinction. In the case at bar there was no direction by the grantors that the deed was left as an escrow, and it presents no evidence of *intent* on the part of the grantors to make this deed an escrow. There is no condition mentioned in the agreement to be performed before delivery, which in law would create it an escrow, and presumptions arising from the language of the agreement being taken most strongly against the grantor, forbids any implication of its being an escrow."¹

§ 321. Grantee must perform condition before entitled to delivery.—When the instrument has been placed in the hands of the depositary the grantee is not entitled to it, nor does he acquire any rights under it, until he has performed the condition upon which the depositary is to deliver it to him.² "A deed takes effect only from the time of its delivery; and where a deed is placed in the hands of a third person as an escrow, as in this case, the grantee was only entitled to a delivery of the deed upon a strict compliance with the terms of the agreement,

¹ *Hathaway v. Payne*, 34 N. Y. 92, 107. And see *O'Kelly v. O'Kelly*, 8 Met. 436; *Murray v. Stair*, 2 Barn. & C. 82; *Shaw v. Hayward*, 7 Cush. 175; *Cook v. Brown*, 34 N. H. 465; *Hunter v. Hunter*, 17 Barb. 25; *Goodell v. Pierce*, 2 Hill, 659; *Tooley v. Dibble*, 2 Hill, 641; *Rugles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Price v. Pittsburgh etc. R. R. Co.*, 34 Ill. 13.

² *Demesmey v. Gravelin*, 56 Ill. 93; *Skinner v. Baker*, 79 Ill. 496; *Eichlor v. Holroyd*, 15 Bradw. (Ill.) 657.

which was clearly a condition precedent to its delivery.”¹ And the condition, it has been held, must be literally fulfilled. Hence, where the condition upon which a deed delivered as an escrow is to become absolute is, that the grantee shall execute a bond for the maintenance and support of a third person during life, the deed cannot become operative in case the bond is not executed, although such third person has died, and the grantee had during his life given him the required support.² “Until the condition is performed, the deed is of no more force than it would have been if the grantor after signing and sealing the instrument had deposited it in his own desk.”³

§ 322. Escrow delivered without authority or obtained fraudulently passes no title.—Until the condition has been performed and the deed delivered over the title does not pass, but remains in the grantor. If the condition is not performed, the grantee, we have seen, is not entitled to the deed. If the depository deliver the deed without authority to do so from the grantor, or if the grantee obtain possession of it fraudulently, without performing the condition, the deed is void. The deed thus obtained conveys no title either to the grantee or purchasers under him.⁴ Although, as was previously shown, the

¹ *Dyson v. Bradshaw*, 23 Cal. 528, 536, per Crocker, J. See, also, *Beem v. McKusick*, 10 Cal. 538.

² *Hinman v. Booth*, 21 Wend. 267. And see *Abbott v. Alsdorf*, 19 Mich. 157; *Jackson v. Rowland*, 6 Wend. 666.

³ *Smith v. South Royalton Bank*, 32 Vt. 341, 347; 76 Am. Dec. 179, per Bennett, J.

⁴ *White v. Core*, 20 W. Va. 272; *Black v. Shreve*, 13 N. J. Eq. 458; *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314; s. c. 6 Wis. 453; *Smith v. South Royalton Bank*, 32 Vt. 341; 76 Am. Dec. 179; *Patrick v. McCormick*, 10 Neb. 1; *People v. Bostwick*, 32 N. Y. 450; *Dyson v. Bradshaw*, 23 Cal. 536; *Fitch v. Bunch*, 30 Cal. 208; *Abbott v. Alsdorf*, 19 Mich. 158; *Cagger v. Lansing*, 57 Barb. 421; *Illinois Cent. R. R. Co. v. McCullough*, 59 Ill. 170; *Peter v. Wright*, 6 Port. (Ind.) 183; *Fraser v. Davie*, 11 S. C. 56; *Stiles v. Brown*, 16 Vt. 563; *Calhoun v. American Emigrant Co.*, 93 U. S. 124; *Daggett v. Daggett*, 143 Mass. 516; *Carter v. Mills*, 30 Mo. 439; *Townsend v. Hawkins*, 45 Mo. 285; *Robbins v. Magee*, 76 Ind. 381; *Fitzgerald v. Goff*, 99 Ind. 28; *Gould v. Wise*, 97 Cal. 532; *Tisher v. Beckwith*, 30 Wis. 55; 11 Am. Rep. 546; *Southern L. Ins. Co. v. Cole*, 4 Fla.

possession of a deed by the grantee is *prima facie* evidence of its delivery, yet where it appears that the final transfer was dependent upon the compliance with certain terms

359; Colton v. Gregory, 10 Neb. 125; Harkreader v. Clayton, 56 Miss. 383; Henry v. Carson, 96 Ind. 412; Peter v. Wright, 6 Ind. 183; Berry v. Anderson, 22 Ind. 36. And see Fresno Land Co. v. McCarthy, 59 Cal. 309. In the case of Smith v. South Royalton Bank, *supra*, a bond and mortgage had been executed for the purpose of being delivered to the treasurer of the State, to enable a bank to obtain an increased issue of registered bills. The mortgagor delivered the bond and mortgage to a third person until he received an indemnity bond from the bank. The depository, however, delivered the instruments to the treasurer in violation of his trust. No bond ever having been delivered, and suit being brought, the mortgagor urged that no title passed to the treasurer, because the condition upon which delivery was to be made was not performed. Bennett, J., delivering the opinion of the court, said: "The deed not having been delivered, it was a nullity and void, or, more properly speaking, *never existed*, and must be tainted with the fraud of Rolfe, which goes to the very existence of the instruments, into whosoever hands they may come. It is not like the cases where the *fraud is collateral*, as where the instrument has become a perfect one, and it is appropriated fraudulently to a use different from the one for which it was created. It is then the important question in the case, whether from the facts disclosed there is any good ground to hold that the grantors cannot avail themselves of the want of a delivery of the bond and mortgage? It is said on the part of the defense that the orators ought to be bound by the delivery of the bond and mortgage by Rolfe, although he has been guilty of a gross fraud, and has transcended his authority, because the orators have enabled him to mislead an innocent party, and that the maxim of natural justice applies to this case with its full force, 'that he who, though without any intentional fraud, has put it in the power of another person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the loss rather than the other party who has placed confidence in him.' Though this position may seem specious, yet we think, as applied to this case, it is not sound. The authority delegated to Rolfe was to do a single act, and his agency was of the *most special kind*, requiring him only to perform a single act, strictly ministerial in its character. Mr. Smith, in his treatise on Mercantile Law, a work of great accuracy, on page 59, second edition, after defining a general agent, proceeds to say: 'His authority cannot be limited by any private order or direction not known to the party dealing with him. But the rule,' he says, 'is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction, for it is,' he adds, 'the duty of the person dealing with such a one to ascertain the extent of his authority, and if he does not do it he must abide the consequences.' So, in Paley on Agency, by Lloyd, third edition, 199, note, after stating the rule applicable to general agents,

and conditions, the party who claims under the deed must prove such compliance. His right to the deed and to the property conveyed is subject to the performance of

and the assumptions to be made that they have an unqualified authority to act in all matters within the scope of their agency, it is said, 'in the case of a particular agent, that is, one employed specially in that single instance, no such assumption can be reasonably made, and it becomes the duty of the person dealing with him to ascertain by inquiry the nature and extent of his authority, and if it be departed from he must be content to abide the consequences.' This distinction, he says, will explain all the cases in the text. See, also, Smith's Mer. Law (3d ed.), 107, 108; *Wooden v. Burford*, 2 Crompt. & M. 395; *Jordan v. Norton*, 4 Mees. & W. 155; *Sykes v. Giles*, 5 Mees. & W. 645. 'Where one of two innocent persons must suffer from the fraud of a third person, the inquiry naturally arises, which gave the credit?' Smith is not chargeable with holding out Rolfe as possessing larger powers than he in fact had; and the State treasurer not having ascertained the true extent of his powers, though this may be without any personal fault in him, must, as between Smith and himself, be regarded as having trusted to Rolfe rather than Smith; or in other words, the State treasurer, or rather those in whose behalf he was acting, must sustain the loss occasioned by the fraud of Rolfe rather than Smith. If an agent in dealing for his principal strictly within his authority commits a fraud in the sale of property, the principal must answer for it, unless he chooses to repudiate the fraud and restore the dealer to his former situation. He cannot adopt the dealing and repudiate the fraud. The maxim in relation to which of two innocent persons shall suffer from the fraud of a third person, is not to be so extended as to make the principal responsible for the want of the general integrity of his agent, and for his acts attended with fraud which are not included within the power conferred upon him. Such an application of the maxim would break down well-settled principles, and would prevent the principal from defending upon the ground that it was the fraud of the agent, even in cases where the agent acted in a matter beyond the extent of his powers. The maxim was first applied by Lord Holt in an action for a *deceit* in the sale of some silks by an agent who had authority to make the sale': 1 Salk. 289. In such a case the application of the maxim is well enough, but here Rolfe was a special agent to deliver the deed upon a special condition, and the fraud consisted in his doing an entire act which he had no authority to do. It might have been better if the law had required that it should appear upon the face of a deed that it was delivered as an escrow, and, if such had been the rule, grantees might have been more secure against fraud; but, as was well said by Marshall, C. J., 'the law is settled otherwise, and it is not to be disturbed by the court': 4 Cranch, 222. The position that an agent with limited powers cannot bind his principal when he transcends his powers, and that the person dealing with him is bound to know the extent of his powers, is too well established to be questioned: 1 Peters, 290. The bond and mortgage, then,

a condition precedent, and this performance it is necessary to prove. That the condition upon which he was to receive the deed has been performed cannot be inferred from the fact that the grantee has the unexplained possession of the deed.¹ "If the party to be bound suffer the paper to go into the hands of a third person, with authority to deliver it in case certain conditions are complied with, a transfer of the paper without compliance with the conditions is no delivery, for want of authority in the agent to do the act. It is the duty of the party thus accepting a tradition of the instrument to see to it that the agent, in the act of transfer, is authorized to do it, unless he be the party's general agent."² An owner of a tract of land, having subscribed for stock in a railroad company, signed and acknowledged the deed for the land, which, it was agreed, the company should take in

was a *nullity* in the hands of the treasurer *for the want of a delivery*, and he cannot escape this consequence by an application to the case of the maxim, which is sometimes applied as between two innocent parties. This is not like the case of *Pratt v. Holman et al.*, 16 Vt. 530. There the deed was delivered to the agent appointed by the grantee to procure it. In such a case the delivery to the agent was effective to pass the title, although it was delivered upon a condition which had not been performed: 1 Seld. 238; 8 Mass. 238. In legal effect it was a delivery to a grantee. Besides, the court in *Pratt v. Holman* put the case upon the ground that the agent was satisfied with *the promise to pay the money*, and, if not paid, an action might be had on the promise. This was clearly a case where the deed took effect from the time it was delivered to the agent.' And see *Cotton v. Gregory*, 10 Neb. 125; *Titus v. Phillips*, 18 N. J. Eq. 541.

¹ *Black v. Shreve*, 13 N. J. Eq. (2 Beasl.) 455.

² *Whelpley, J.*, in *Black v. Shreve*, *supra*. But see *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478, where Rogers, J., said, his remarks, however, being *obiter dicta*, as the case was decided on another point: "If a man employs an incompetent or unfaithful agent, he is the cause of the loss, so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary to them. But this principle must not be extended to a person who has no possible means of protecting himself, who acts on the presumption that the records of the county are not intended to mislead, but speak the truth, that the acts and declarations of the grantor are such as they purport to be. If the grantor is injured by the conduct of his agents, the remedy is against them; surely

payment for the stock subscribed. The deed was placed in the hands of a third person, the grantor telling him that an agent would call in a short time, and deliver a certificate for the stock subscribed, and the depositary was instructed, upon the receipt of the certificate, to deliver the deed to the company's agent. The agent called, but did not have any certificate of stock; he, however, requested the depositary to place the deed in his hands, so that he might give it to the attorney of the company for examination. This was done, and the company sold the land. But it was held that the delivery by the depositary before the performance of the condition did not convey the title, and that the owner was entitled to have his deed and the deed made by the railroad company to its grantee set aside as void.¹ But where persons, after an exchange of lands, had deposited their deeds in escrow, and transferred to one another the possession of their respective tracts of land, and the depositary had one of the deeds recorded without the grantor's knowledge, and a person in good faith took a mortgage on the land for a loan, it was held that, although the mortgagor neglected to pay off certain encumbrances, as he agreed to do with his grantor, still the lien of the mortgagee was valid.²

§ 323. Legal title until performance of condition is in grantor.—The legal title where possession of an escrow

there is no reason that it should affect an innocent purchaser who pays his money on the faith that his title is good. Nor is it any answer that he may protect himself by proper covenants. This, in many cases, may be impracticable, and would amount to this, to discourage all sales or transfers of property whatever."

¹ *Berry v. Anderson*, 22 Ind. 40. And see *Wallace v. Harris*, 32 Mich. 380; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Illinois Cent. R. R. Co. v. McCullough*, 59 Ill. 170.

² *Bailey v. Crim*, 9 Biss. 95. There are many cases that hold that although a deed may have been delivered without the performance of the condition, a purchaser from the grantee will obtain a valid title: *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478; *Simpson v. Del Hoyo*, 44 N. Y. 118; *Quick v. Milligan*, 108 Ind. 419; 58 Am. Rep. 49; *Hubbard v. Greeley*, 84 Me. 340; *Simpson v. Bank of Commerce in Buffalo*, 43 Hun, 156; 120 N. Y. 623. See, also, *Miller v. Fletcher*, 27 Gratt. 403; 21 Am. Rep. 356; *Somes v. Brewer*, 2 Pick. 184; 13 Am. Dec. 406.

is obtained, without performance of the condition upon which a delivery to the grantee was to be made, remains in the grantor, or if he is dead, in his heirs. To maintain the plea of an innocent purchaser, a person must have acquired the legal title, which he seeks to protect against some latent equity or charge on the land. Hence, this plea cannot avail a person who has bought on the faith of the possession of the escrow by the person named therein, where such possession has been obtained wrongfully. The conveyance made by the grantee in the escrow cannot affect the legal title, for that remains in the grantor or his heirs. And as the equities of such purchaser and those of the heirs of the original grantor are equal, the legal title which is vested in such heirs must prevail.¹ Where a deed is delivered before compliance with the condition, the grantor is not estopped from setting up its invalidity by the fact that he had acted upon the belief that the condition has been complied with before delivery.² When the deed has been delivered without authority the grantor may recover it by action, or have it removed as a cloud upon his title.³

§ 324. Not an escrow if grantor retains right of control.—As we have already pointed out, it is essential to a complete and effectual delivery of an instrument intended to operate as a present deed, that the grantor should part with all control and dominion over it. If he retains the right to recall the deed, it cannot be considered as delivered. The same principle applies to an escrow. If the grantor retains the right of control over it, it is not an escrow, notwithstanding the fact that it may be deposited with a third person with instructions to deliver it.

¹ *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 309; *Patrick v. McCormick*, 10 Neb. 1. But see *Bailey v. Crim*, 9 Biss. 95.

² *Robbins v. Magee*, 76 Ind. 381.

³ *Eichlor v. Holroyd*, 15 Bradw. (Ill.) 657. A plaintiff, who has placed a deed in escrow, is still the owner, and as title does not vest before final payment, may maintain an action to quiet title: *Heney v. Pesoli*, 109 Cal. 53.

to the grantee upon the compliance by him of certain specified conditions.¹ "An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession, and of the power and control over the deed by the grantor for the benefit of the grantee *at the time of delivery.*"² A grantor cannot revoke a deed delivered as an escrow. An agreement was made for the sale of land, and the owner executed a deed and deposited the same with a third person to be delivered to the plaintiff upon the payment of the purchase price. The contract fixed no time for payment; the grantee took possession immediately, and three days later tendered the purchase price to the depository. It was held that the deed was an escrow, and that the tender was made within a reasonable time.³

§ 325. Voluntary conveyance.—But it seems that if a person execute a voluntary conveyance without consideration, intending it as a donation of land, and place it in the hands of a custodian, he may withdraw it at any time before delivery; the custodian is not the judge of the performance of the conditions, where delivery is conditional, and he has no power to deliver the instrument until the donor is satisfied. Therefore, where a deed was thus executed and left with a person, not to be delivered until signed and acknowledged by the grantor's wife, nor until the grantee should execute a mortgage, as the grantor termed it, securing to him and his wife a life estate in the premises, and the custodian placed the deed on record without authority, after the grantor's death, although it had not been signed and acknowledged by the wife, and the mortgage had not been delivered, the

¹ Campbell v. Thomas, 42 Wis. 437; 24 Am. Rep. 427. See Miller v. Sears, 91 Cal. 282; 25 Am. St. Rep. 176. See § 313, *ante*.

² Prutsman v. Baker, 30 Wis. 644, 646; 11 Am. Rep. 592, per Dixon, C. J.

³ Cannon v. Handley, 72 Cal. 133. See, also, Millett v. Parker, 2 Met. (Ky.) 608.

deed was set aside at the suit of the heirs of the grantor as a cloud upon their title.¹

§ 326. Comments.—In the case cited in the preceding section, it appeared that the conditions had not been performed, and while the decision was right upon the merits, we think the language quoted in the note is subject to criticism. Although the deed was voluntary, we understand that a voluntary conveyance, so far as the grantor's title is concerned, is just as effective as any other, when it becomes an executed contract. If, therefore, the conditions upon which the deed was to take effect had been complied with, the donee in our opinion would be entitled to the deed, and where the grantor had not stipulated that his judgment as to the compliance with the conditions should be final, he could not arbitrarily say that the conditions had not been performed. It would certainly seem that the grantee ought, upon proof of the performance of the conditions, to be entitled to the delivery of the deed.

§ 327. Equity will enforce the delivery of a deed held as an escrow, where the condition has been fulfilled. In a case of this kind, the depositary is as much the agent of the grantor as of the grantee. His obligation to deliver the deed on performance of the condition is just as strong as it is to withhold it until performance.² And the destruction or detention by the grantor of the deed, after

¹ *Hoig v. Adrian College*, 83 Ill. 267. Mr. Justice Scott delivered the opinion of the court, and said: "It was his [the grantor's] privilege to judge for himself whether the terms upon which he was willing to deliver the deed to his property as a donation had been performed. The scrivener in whose custody the deed was left, was not invested with any discretion in regard to it. He had no authority to deliver it until the grantor was satisfied it should be. Being a voluntary conveyance without consideration, the grantor was at liberty at any time to withdraw the deed from the possession of the custodian, and the grantee could have no just cause to complain. The grantor was under no legal obligation to complete the donation."

² *Stanton v. Miller*, 65 Barb. 58. And see *Lessee of Shirley v. Ayers*, 14 Ohio, 308; 45 Am. Dec. 546.

performance of the condition, will not prevent the deed taking effect.¹ Where a person executes and acknowledges a deed conveying a farm in fee simple to his sister, and leaves it in the custody of a third party undelivered and without any instructions as to delivery, and subsequently makes a will in which he devises two acres of the farm to another for life, with the proviso that the same, upon the death of the devisee, should "revert back to said farm, and become the property of my said sister, Barbara Lloyd, together with other lands I have already conveyed by deed to her," the devisee is entitled to a life estate in the two acres, and the sister is entitled to the farm in fee simple, subject to such life estate.²

§ 328. At what time title passes.—The general rule is that the title passes only upon the second delivery, or upon the happening of the event made the condition of

¹ *Regan v. Howe*, 121 Mass. 424. Colt, J., delivering the opinion of the court, said: "There was evidence that the conditions upon which the deed was to be delivered to the grantee had been fully performed, so that the equitable title to it was in the grantee; that the scrivener in discharge of his trust, intending to complete its delivery, gave it to the petitioner herself to carry and deliver it to the grantee, and that she took it away, declaring that she took it for that purpose. This is enough to constitute a delivery, if subsequently accepted as a delivery by the grantee. It is not necessary as between the parties themselves, even when both are present, that the deed should be placed in the actual custody of the grantee, or of his agent. It may remain with the grantor, and it will be good, if there are other acts and declarations sufficient to show an intention to treat it as delivered. The significance of the acts or declarations relied on will be greatly strengthened where the deed is placed in the hands of a third person, by the fact that the conditions upon which the delivery of the deed depends have been fully performed. The destruction or detention of the deed by the grantor after such delivery, cannot divest the grantee's estate."

² *Thompson's Executors v. Lloyd*, 49 Pa. St. 127. The court, per Woodward, C. J., said: "The deed can have no operation as a conveyance of the title, because it was not delivered in the lifetime of the grantor; but it existed, and may be taken in connection with the will to explain the language quoted above. Wills often refer to deeds, bonds, and other instruments of writing which exist independently of themselves; and to explain the intention of the testator, recourse is always had to the instrument referred to. It becomes in some sense a part of the will, and is to be taken in connection with it to get at the testamen-

delivery.¹ But in certain cases, for the prevention of injustice, the instrument will relate back to the first delivery so as to pass title at that time. The law upon this point has been thus stated: "The title only passes on the performance of the condition or the happening of the event, except in certain cases where by fiction of law the writing is allowed to take effect from the first delivery. This relation back to the first delivery is permitted, however, only in cases of necessity and where no injustice will be done, to avoid injury to the operation of the deed from events happening between the first and second delivery; as if the grantor, being a *feme sole*, should marry, or whether a *feme sole* or not, should die or be attainted

tary purpose. So, using the deed in this instance to interpret the allusion in the will, there can be no doubt that the latter received the proper construction in the court below, and that Mrs. Lloyd holds, *under the will*, the title to the farm, subject to the life estate of Barbara Clough in the two acres." See, also, *Cannon v. Handley*, 72 Cal. 113; *Hughes v. Thistlewood*, 40 Kan. 232.

¹ *Clanin v. Machine Co.*, 118 Ind. 372; 21 N. E. Rep. 35; *Quick v. Milligan*, 108 Ind. 419; 58 Am. Rep. 49; *Berry v. Anderson*, 22 Ind. 36; *Robbins v. Magee*, 76 Ind. 381; *Henry v. Carson*, 96 Ind. 412; *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37; *White Star Line v. Moragne*, 91 Ala. 610; *Griffith v. Winborne*, 105 N. C. 403; *Schmidt v. Deegan*, 69 Wis. 300; *Everts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314; *Logsdon v. Newton*, 54 Iowa, 448; *Haven v. Kramer*, 41 Iowa, 382; *Jackson v. Rowley*, 88 Iowa, 184; *Skinner v. Baker*, 79 Ill. 496; *Burnap v. Sharpsteen*, 149 Ill. 225; *Illinois Cent. R. R. Co. v. McCullough*, 59 Ill. 166; *Stanley v. Valentine*, 79 Ill. 544; *Stone v. Dewall*, 77 Ill. 475; *Chicago Land Co. v. Peck*, 112 Ill. 408; *Price v. Hudson*, 125 Ill. 284; *Cannon v. Handley*, 72 Cal. 133; *Dyson v. Bradshaw*, 23 Cal. 528; *Mitchell v. Shortt*, 113 Ill. 251; *White v. Core*, 20 W. Va. 272; *Shirley v. Ayers*, 14 Ohio, 308; 45 Am. Dec. 546; *Ogden v. Ogden*, 4 Ohio St. 182; *Knopf v. Hansen*, 37 Minn. 215; *Lindley v. Groff*, 37 Minn. 338; *Danforth v. Paxton*, 1 Wash. St. 6; *Atkinson v. Tabor*, 11 Col. 277; *Jackson v. Sheldon*, 22 Me. 569; *Rhodes v. Gardiner School District*, 30 Me. 110; *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369; *Cressinger v. Desseburg*, 42 Mich. 580; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *Davis v. Kneale*, 103 Mich. 323; 61 N. W. Rep. 508; *Gaston v. City of Portland*, 16 Or. 255; *Daggett v. Daggett*, 143 Mass. 516; *Nichols v. Nichols*, 28 Vt. 228; 67 Am. Dec. 699; *Smith v. South Royalton Bank*, 32 Vt. 341; 76 Am. Dec. 179; *Calhoun Co. v. American Emigrant Co.*, 93 U. S. 124; *People v. Bostwick*, 32 N. Y. 445; *Jackson v. Catlin*, 2 Johns. 248; 3 Am. Dec. 415; *Patrick v. McCormick*, 10 Neb. 1; *Titus v. Phillips*, 18 N. J. Eq. 541; *Black v. Shreve*, 13 N. J. Eq. 455; *State Bank v. Evans*, 15 N. J. L. 115.

after the first and before the second delivery, the deed will be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity. But subject only to this fiction of relation in cases like those above supposed and others of the kind, and which is only allowed to prevail in furtherance of justice and where no injury will arise to the rights of third persons, the instrument has no effect as a deed, and no title passes until the second delivery; and it has accordingly been held, that if, in the mean time, the estate should be levied upon by a creditor of the grantor, he would hold by virtue of such levy, in preference to the grantee in the deed."¹ Relation, however, is made to the first delivery, only for the purpose of effectuating the deed. And it may be stated that so far as the *capacity* of the grantor is concerned, the deed is to take effect from the first delivery.² A grantor executed a deed, his wife joining in the conveyance, and deposited it in escrow. Before the payment of the purchase money and the acceptance of the deed, the wife of the grantor died and he remarried; but it was held that the claim of the second wife to dower was taken away by relation of the deed back to the time of its delivery in escrow.³ A grantor deposited a deed with a third person as an escrow, instructing him to deliver it to the grantee on the production of a mortgage executed and recorded, and a certificate of the clerk that no other encumbrances were on record. On the receipt of the mortgage and the certificate of registry by the clerk, the depositary delivered the deed to the grantee, and the

¹ *Prutsman v. Baker*, 30 Wis. 644, 649; 11 Am. Rep. 592.

² 2 Wharton on Contracts, § 679. And see *Andrews v. Farnham*, 29 Minn. 246; *Black v. Hoyt*, 33 Ohio St. 203; *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66; *Graham v. Graham*, 1 Ves. Jr., 275; *Foster v. Mansfield*, 3 Met. 412; 37 Am. Dec. 154. See *Bostwick v. McEvoy*, 62 Cal. 496.

³ *Vorheis v. Ketch*, 8 Phila. 554. And see *Harkreader v. Clayton*, 56 Miss. 383; 31 Am. Rep. 369.

mortgage to the grantor. The clerk, however, made a mistake in the registry of the mortgage as to the amount of the debt. But, notwithstanding this, the condition was considered as performed, and the delivery to the grantee was deemed proper; the deed was held to relate back, so as to give effect to an intermediate conveyance by the grantee.¹

§ 329. Where it is the intention of the parties that the conveyance is, after the performance of the condition, to take effect from the date of delivery in escrow, their intention will control. Accordingly, where deeds were executed on a certain day, and placed as escrows in the hands of the attorney for the grantee, and it was agreed that if certain bonds and mortgages should be delivered within a fixed time the deeds should take effect from the day of the first delivery, it was held that the deeds took effect from that day, if the bonds and mortgages were delivered within the time specified.²

¹ *Beekman v. Frost*, 18 Johns. 544; 9 Am. Dec. 246. See, also, *Green v. Putnam*, 1 Barb. 500; *James v. Vanderheyden*, 1 Paige, 385; *Riggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Everts v. Agnes*, 4 Wis. 351; 65 Am. Dec. 314; *Shirley v. Ayres*, 14 Ohio, 307; 45 Am. Dec. 546.

² *Price v. Pittsburgh, Fort Wayne etc. R. R. Co.*, 34 Ill. 13, 33. In this case the opinion of the court was delivered by Mr. Justice Breese, and he observes upon the subject we are now considering: "It is generally true, and is the old doctrine of the books, that if a deed is delivered to a stranger to be delivered to the grantee, on the performance by him of certain conditions, and they are fully performed and the deed delivered, that the deed takes effect from the second delivery, and to be considered the deed of the party from that time. This rule, it is said, does not apply where justice requires a resort to fiction: 4 Kent's Com. 454. The instances usually put are, when the grantor, after the deposit of the deed as an escrow, dies, or becomes insane, or if a *feme sole* marries before the grantee has performed the conditions; in such cases the law will make the second delivery relate back to the time of the deposit of the escrow: 1 Shep. Touch. 123. What effect the agreement of the parties should have upon the time of the delivery is not there discussed, nor is it said these are the only instances in which there shall be this relation back. The case of *Lessee of Shirley v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546, was an ejectment, where it was held a deed delivered as an escrow should take effect on its first delivery, on the performance of the condition, if it was necessary to protect the grantee, or those claiming under him, against intervening rights. The case of *Beekman v.*

§ 330. Liens of attachment or judgment upon land prior to second delivery.—The performance of the condition is indispensable to a transfer of title. Until the condition is performed the title remains in the grantor.

Frost, 18 Johns. 544, 9 Am. Dec. 246, in the court of errors, holds the same doctrine. A very strong case is to be found in 9 Mass. 307, 6 Am. Dec. 67, *Hatch v. Hatch et al.*, where the court held that a writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, the court say, being almost entirely nominal, when we consider the rules of decision which have been resorted to, for the purpose of effectuating the intentions of the grantor or obligor, in some cases of necessity. If delivered as an escrow, and not in name as a deed, it will, nevertheless, be regarded and construed as a deed from the first delivery, as soon as the event happens, or the consideration is performed, upon which the effect had been suspended, if this construction should be then necessary in furtherance of the lawful intentions of the parties. The case of *Hall v. Harris*, 5 Ired. Eq. 303, is to the same effect. The question in this case was, whether a deed took effect on the second day of March, the date of its execution, or on the tenth, the day on which a full payment for the land was made. The trade was made on the 2d of March, on which day part of the price was paid, and the vendor was to make a deed, and hand it to one Morgan, to be by him handed to the vendee when he paid the price. On that day the vendor made the deed and handed it to Morgan. Afterward, on the 10th of March, the vendee paid Morgan the balance due and received the deed. The purpose, the court say, for which the deed was delivered to a third party instead of being delivered directly to the plaintiff, was merely to secure the payment of the price. When that was paid, the plaintiff had a right to the deed. The purpose for which it was put into the hands of a third person being accomplished, the plaintiff then held the deed in the same manner he would have held it, if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way. Though the plaintiff might have avoided the purchase, his rights cannot be affected by that fact. The court remarks, if the vendor had died after the delivery to the third person and before the payment, the vendee, upon making the payment, would have been entitled to the deed, and it must have taken effect from the first delivery, or it could not have taken effect at all. The intention was, it should be the deed of the vendor from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide*, and not a contrivance to interfere with the rights of creditors, the deed must be allowed to take effect." The court conclude by saying: "We are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person, to be

Hence, where a deed was delivered in escrow and was subsequently delivered absolutely, but prior to the second delivery a judgment was obtained against the grantor, it was held that the title to the land passed to and was vested in the purchaser under the judgment. The court referred to the doctrine that in some cases the deed will relate back to the day of the first delivery, but considered that it had no application to a case of this character. "The necessity," observes the court, "which justifies a resort to fiction does not exist in this case. The grantor was not only able to make, and the grantee to receive, what is called a second delivery, but in point of fact it was made, and the deed took effect only from that time."¹

handed to another, upon a condition which is afterward complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention that it should not then become a deed. In the case before us the proof was, that the deeds were delivered as deeds, to the solicitor of the company, with the understanding when the bonds and mortgages of the railroad company to be given in payment of the lots, and which had to be executed in a distant State, were returned from there, the deeds were to take effect as of May 1, 1860, and if the bonds were not returned, the deeds were not to take effect at all; that the bonds were not returned until the fall of 1860, and that he, the witness, should not have delivered or recorded the deeds until the bonds came; that the bonds and mortgages are dated, and bear interest from May 1, 1860, and interest had been paid on them from that date. It is a case quite like the case of *Hatch v. Hatch*, decided by the Supreme Court of Massachusetts, and the case in *Iredell*, decided by the Supreme Court of North Carolina. In all such cases the intention of the parties is to be considered, and it seems quite manifest these parties intended those deeds should have effect from the day of their execution, if the conditions were performed; and they were fully performed." The court, however, said that it was inclined to the opinion, under the circumstances of the case, that the deeds were delivered absolutely in the first instance. If the grantor die before the happening of the event, and his heirs afterward make a deed to the purchaser, and the latter pays the balance of the purchase money to the administrator of the grantor's estate, the administrator will hold the money as an individual for the heirs as their property, it being considered as realty, and not subject to administration as personal assets: *Teneick v. Flagg*, 5 Dutch. 25.

¹ *Jackson v. Rowland*, 6 Wend. 666, 670; 3 Wash. Real Prop. (4th ed.) 302; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *De Mesmey v. Gravelin*, 56 Ill. 93.

§ 331. **As to the necessity of an actual second delivery.**—In some of the cases it seems to be assumed that a second delivery is necessary upon the happening of the event, or the performance of the condition, to vest the title in the grantee.¹ But we can see no good reason why the deed should be actually turned over to the grantee before his title is complete. The grantor has parted with all control and dominion over the deed, and he can have no right to direct the withholding of the deed from the grantee; and if the latter has performed the condition upon which delivery to him was to be made, it seems to us that it is immaterial, except as a question of evidence, or notice, whether the deed is actually delivered to him or not. There seems to be no direct authority upon this point, but in one case the court declared, that the escrow “does not become the grantor’s deed, and that no estate passes until the event has happened upon which it is to be delivered to the grantee, or until the *second* delivery, or re-delivery, as it is sometimes called, by the depositary to the grantee. Whether, in such case, actual delivery to the grantee is necessary in order to give effect to the instrument as the deed of the grantor, seems not to be very well settled, but the inference would appear to be that it is not. The indication from the authorities quite clearly is that it becomes the grantor’s deed the moment that the condition has been performed or the event has happened, upon which the grantee is entitled to the possession of it, and that thenceforth the depositary or holder is regarded as the mere agent or trustee for the grantee.”²

§ 332. **No particular form of delivery required.**—In some of the early treatises expressions will be found admonishing persons, desiring to deliver deeds in escrow, to use words of some particular form expressing that intent, as, “I deliver this as an escrow to you to keep

¹ 2 Wash. Real Prop. (4th ed.) 304.

² Prutsman v. Baker, 30 Wis. 644, 649; 11 Am. Rep. 592, per Dixon, C. J. And see Simpson v. McGlathery, 52 Miss. 723; Whitfield v. Harris, 48 Miss. 710.

until such a day, and upon condition, etc.; and there you shall deliver this escrow to him as my deed.”¹ This, however, is clearly unnecessary. “It is not necessary that the term ‘escrow’ should be used when an instrument is delivered to a third person in order to prevent its taking immediate effect. That term would perhaps evince more clearly and distinctly than any other the actual intention of the parties. But where such intention is indicated in any other manner, effect is to be given to it, unless the technical or legal phraseology employed by the parties renders it impracticable. What the nature of the delivery was, whether absolute or conditional, and what were the actual intentions of the parties, are always questions of fact to be settled by the jury, where the evidence leaves any doubt upon the subject. The cases seem to consider a declaration by the grantor when he executes the instrument or delivers it to a third person, *that he delivers it as his deed*, as strongly indicating an intention that it shall take immediate effect. Such a declaration, however, is, I apprehend, but matter of evidence, to be weighed in connection with the other circumstances in the case, in order to determine the real character of the transaction.”² A deed inclosed with a letter sent to a third person, not the agent of the grantee, to be delivered upon the payment of the purchase price to the grantee, but not declared in the letter to be an escrow, is nevertheless an escrow, and does not vest the title in the grantee until performance of the condition.³

¹ 3 Wash. Real Prop. (4th ed.) 302.

² Clark v. Gifford, 10 Wend. 311; Wheelwright v. Wheelwright, 2 Mass. 452; 3 Am. Dec. 66. And see Jackson v. Sheldon, 22 Me. 569; White v. Bailey, 14 Conn. 271; Shoenberger v. Hackman, 37 Pa. St. 87.

³ White v. Bailey, 14 Conn. 271. Chief Justice Williams, in delivering the opinion of the court, said: “The witness swore that it was delivered as an escrow; but the letter accompanying the deed to him did not declare in express terms that it was sent to him as such; and hence it is claimed that it cannot be so considered by the court; and the question raised is whether a deed sent to a third person not the agent of the grantee, to be delivered only upon the payment of money by the grantee, vests the title in the grantee before actual delivery to him, or payment of the money? And it would seem that a statement of the question

§ 333. The condition to make the instrument an escrow must be one to be performed by the grantee.—As a general proposition, a conveyance is considered an escrow when it is delivered by the grantor to a third person, to be delivered to the grantee on the performance of some condition. This condition, however, must be one that the grantee is to perform and not the grantor. Where a grantor has executed a complete deed and surrendered all possession and control over it, in pursuance of the contract of the parties, he has done all that is required, and it would be inequitable to allow any subsequent act or omission on his part to impair the operation or effect of his own deed. Therefore, if a grantor execute a deed and deposit it with a third person, until there may be an

would give the answer. It would certainly require strong authority to induce us to come to such a result as is claimed by the defendant in error. None is produced except a *dictum* of Judge Swift, that when a deed is delivered to a stranger, it must be declared to be delivered as an escrow; for if delivered as the deed of the party, it will take effect immediately: 1 Sug. Dig. 179. The writer could not, it is believed, have intended to say that it could not be an escrow unless the grantee in terms declared he intended it to be such; for a great proportion of persons cannot be supposed even to know the meaning of the term; and it might as well be said that a deed could not operate as such, unless the party declared it to be his act and deed, which has often been held to be unnecessary: *Thoroughgood's case*, 9 Rep. 137; *Holford v. Parker*, Hob. 246. No form of words can be necessary in one case any more than in the other; and the writer must have meant that the evidence must show that the grantor intended it as an escrow, otherwise it would be presumed to be what it purported to be, his act and deed. For the law is well settled that a deed is delivered as an escrow when the delivery is conditional; that is, when it is delivered to a third person to keep until something be done by the grantee; and it is of no force until the condition be fulfilled: *Jackson d. Gratz et al. v. Catlin*, 2 Johns. 248, 259; 3 Am. Dec. 415; *Clark v. Gifford*, 10 Wend. 310. Now, instead of sending this deed to the party, he sends it to a third person to deliver it upon the payment of three hundred dollars. Would it not have been a gross breach of trust in Tweedy to have delivered it without receiving any money? And yet, according to the defendant's claim, it was just as operative before that delivery as it would have been after. We cannot doubt that no title passed by virtue of this deed, though we consider the question as a question of fact." But it is said that the delivery must be considered absolute unless stated to be conditional: *Currie v. Donald*, 2 Wash. (Va.) 58.

opportunity for acknowledging it, whereupon it is to be delivered to the grantee, it is not an escrow. The refusal of the grantor to acknowledge the deed will not avoid it.¹

§ 333 a. **Delivery after grantor's death.**—While the grantor must make an effectual delivery in his lifetime so as to part with all dominion over the deed, yet when the deed has been placed in escrow, it may be delivered to the grantee after the grantor's death, as the delivery takes effect by relation as of the date of the original delivery to the depositary.² Statements made by the grantor to the effect that he had delivered a deed to one person for another's use are admissible in evidence in an action to secure the delivery of the deed to the grantee, brought subsequently to the grantor's death.³ The death of either party before the performance of the condition will not defeat the deed, but it will, on the happening of the contingency, become effective as from the date of the first delivery.⁴ Where the question concerned the delivery of promissory notes it was said by McKee, J: "An original delivery cannot be made by or on behalf of a dead man. But when the condition on which an original delivery made in the lifetime of a party transpires, the conditional delivery becomes absolute, and the absolute delivery takes effect against the contracting parties from the date of the delivery of the contracts as escrows, notwithstanding the death of one of the contractors before the happening of the condition."⁵

§ 333 b. **Death of party to action for specific performance.**—In actions affecting title to real estate, deeds

¹ *White's Administrators v. Williams*, 2 Green Ch. 376.

² *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326. And see, also, the extended notes to *Jones v. Jones*, 16 Am. Dec. 40; *State Bank v. Evans*, 28 Am. Dec. 408; and *Perry v. Patterson*, 42 Am. Dec. 326.

³ *Brown v. Stutson*, 100 Mich. 574; 43 Am. St. Rep. 462, and cases cited.

⁴ *Webster v. Kings Co. Trust Co.*, 145 N. Y. 275; *Bostwick v. McEvoy*, 62 Cal. 496; *Stone v. Dewart*, 77 Ill. 475; *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Lindley v. Groff*, 37 Minn. 338.

⁵ *Bostwick v. McEvoy*, 62 Cal. 496.

may be executed and delivered to the officers of the court to hold in escrow. In an action brought to compel the specific performance of a contract for the purchase of real estate by the defendant, a deed duly executed and acknowledged by the plaintiffs was tendered and was placed under the control of the court in the hands of the clerk. One of the plaintiffs died after the trial, and it was held that the action did not abate by his death, and that the delivery to the clerk was a good delivery in escrow. A new conveyance from his heirs was held to be unnecessary, as the delivery in escrow was not defeated by his death.¹ Without considering whether a deed placed in the hands of another without the right of recall, to be delivered to the grantee after the grantor's death, is a deed or an escrow, it is settled that such deed will effectually pass the title when delivered after the grantor's death.² And in case of the grantee's death, title will descend to his heirs.³

¹ Webster v. Kings Co. Trust Co., 145 N. Y. 275.

² Howard v. Patrick, 38 Mich. 795; Wallace v. Harris, 32 Mich. 380; Hatch v. Hatch, 9 Mass. 307; 6 Am. Dec. 67; O'Kelly v. O'Kelly, 8 Met. 436; Foster v. Mansfield, 3 Met. 412; 37 Am. Dec. 154; Bury v. Young, 98 Cal. 446; 35 Am. St. Rep. 781; Prutsman v. Baker, 30 Wis. 644; 11 Am. Rep. 492; Hockett v. Jones, 70 Ind. 227; Cook v. Brown, 34 N. H. 460; Goodpaster v. Leathers, 123 Ind. 121; Owen v. Williams, 114 Ind. 179; Smiley v. Smiley, 114 Ind. 258; Williams v. Schatz, 42 Ohio St. 47; Crooks v. Crooks, 34 Ohio St. 610; Stephens v. Huss, 54 Pa. St. 20; Stephens v. Rinehart, 72 Pa. St. 434; Haeg v. Haeg, 53 Minn. 33; Hathaway v. Payne, 34 N. Y. 92; Ball v. Foreman, 37 Ohio St. 132; McCalla v. Bane, 45 Fed. Rep. 828. See § 280, *ante*.

³ See Ashford v. Prewitt, 102 Ala. 264; 48 Am. St. Rep. 37; Teneick v. Flagg, 26 N. J. L. 25; Stone v. Duvall, 77 Ill. 475; Jones v. Jones, 6 Conn. 111; 16 Am. Dec. 35.

CHAPTER XIV.

EXECUTION OF DEEDS BY CORPORATIONS.

PART I.

PRIVATE CORPORATIONS.

- § 334. Signature by corporations.
- § 335. What is sufficient recital of execution by corporation.
- § 336. Seal incident to corporation.
- § 337. What is a corporate seal.
- § 338. Who has the power to convey for the corporation.
- § 339. Compelling directors to execute deed against their judgment.
- § 340. Execution of deed in mode prescribed by law or charter.
- § 341. Who may affix the seal.
- § 342. Rule that power to execute deed must be by deed not applicable to corporations.
- § 343. Proof of the corporate seal.
- § 344. Delivery of deed of corporation.

PART II.

MUNICIPAL CORPORATIONS.

- § 345. Mode of alienation prescribed in charter must be observed.
- § 346. Effect of conditions in charter upon which alienation may be made.
- § 347. Restriction on alienation as affecting power to mortgage or lease.
- § 348. Presumption of regularity.
- § 348 a. Right to convey before dedication to public use.
- § 349. Same rule applicable to municipality as to general government.
- § 350. Requisites and proof deeds.
- § 351. Title cannot be conveyed by a simple ordinance or vote.

PART I.

PRIVATE CORPORATIONS.

§ 334. Signature by corporations.—It is essential to a proper execution of a deed by a corporation that it be done in the corporate name and under the corporate seal.¹
“The technical mode of executing the deed of a corpora-

¹ Hatch v. Barr, 1 Ohio, 390; Zoller v. Ide, 1 Neb. 439.

tion is to conclude the instrument, which should be signed by some officer or agent in the name of the corporation, with, 'in testimony whereof, the common seal of said corporation is hereunto affixed,' and then to affix the seal."¹ And the execution of the instrument should be made in its own name and under its own seal, and not under the name and seal of the agent of the corporation, unless the latter mode is authorized by statute.² Thus, by the provisions of a statute enacted in Vermont in the year 1815, private commercial corporations were empowered to convey lands by a deed reciting the vote of the corporation authorizing the sale, and executed by their president under his seal.³ If a power to sell and convey be conferred upon the trustees of a corporation and not upon the corporation itself, a deed made in the name of the trustees and not of the corporation is valid.⁴

§ 335. What is a sufficient recital of execution by corporation.—Where a deed purporting to be the conveyance of the corporation was executed by an agent, and concluded, "in witness whereof they," mentioning the corporation, "have hereunto set their seal, and the said agent hath hereunto subscribed his name," it was held to bind the corporation.⁵ It is not essential to the

¹ Angell & Ames on Corporations, § 225; *Flint v. Clinton Co.*, 12 N. H. 433.

² *Savings Bank v. Davis*, 8 Conn. 191; *Hatch v. Barr*, 1 Ohio, 390; *Isham v. Bennington Iron Co.*, 19 Vt. 230.

³ *Wheelock v. Moulton*, 15 Vt. 519; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Warner v. Mower*, 11 Vt. 385.

⁴ *De Zeng v. Beekman*, 2 Hill, 489. A deed was made by the treasurer of a corporation, who signed and sealed it in his own name; the conveyance recited that he executed it on behalf of the company, and had authority for that purpose. It was held, however, that it was not the deed of the corporation: *Brinley v. Mann*, 2 Cush. 337; 48 Am. Dec. 669. A similar decision has been made with reference to a mortgage, but the transaction, it was held, would operate as an equitable mortgage against subsequent mortgagees having notice: *Miller v. Rutland etc. R. R. Co.*, 36 Vt. 452. See, also, *Coburn v. Ellenwood*, 4 N. H. 99; *Atkinson v. Bemis*, 11 N. H. 44.

⁵ *Flint v. Clinton*, 12 N. H. 430. It was held also that a lease of a corporation was sufficiently executed which was signed by the trustees in

validity of a deed that it should contain a recital "sealed with our common seal," or similar words, if the fact appears otherwise.¹ Where a deed was made by the president of a company, conveying all his estate and that of his constituents, either in law or in equity, and which he signed, writing under his name the words "president and trustee," it was held to transfer not only the title of the company, but his individual estate as well.² A deed

their individual names, and to which the corporate seal was affixed: *Jackson v. Walsh*, 3 Johns. 226. See *Cooch v. Goodman*, 2 Q. B. (Ad & E., N. S.), 580.

¹ *Goddard's case*, 5 Rep. 5; Com. Dig. Fait, A, 2; *Mill Dam Foundry v. Hovey*, 21 Pick. 417.

² *Vilas v. Reynolds*, 6 Wis. 214. The deed was signed, "J. D. Doty (seal), President and Trustee of the Four Lake Company." The granting words were "does give, grant, bargain, sell, demise, release, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or parcel of land [describing it], together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, and of his constituents, either in law or in equity, either in possession or expectancy of, in and to the above bargained premises, and their hereditaments and appurtenances." Cole, J., delivering the opinion of the court, said: "The description of the parties and the style Doty has adopted in signing the deed, favor the idea that it was intended to be the deed of Doty in his representative, in contradistinction to his individual, capacity. But if we examine the granting part of the deed, and the estate conveyed, we find in substance the following language." He then epitomizes the granting words above given, and continues: "By this language all the estate and interests of the party of the first part, and of *his constituents*, in the premises, passes to the grantee; a mode of expression entirely inconsistent with the idea that Doty conveyed in a fiduciary capacity alone. For if the party of the first part be indeed the Four Lake Company, what was the estate and interest of the constituents in the premises? Who were the constituents referred to, if not the Four Lake Company? If the grant is to be limited to conveying only the title of the company, and if Doty was a fiduciary vendor alone, then the estate of the party of the first part, and the estate of the constituents, was one and the same estate, and the language of the deed becomes senseless and unmeaning. It would all pass in the grant of the estate, of the party of the first part, and the subsequent grant of the estate of his constituents would be unnecessary and of no effect. We therefore think it manifest from this clause of the deed that it was the intention of the parties that Doty should convey to his grantee all the title and interest which he might properly and law-

which declared that the corporation has "caused these presents to be signed by their president, and their common seal to be affixed," signed "A B, President," and sealed, is the deed of the corporation.¹ A deed of a corporation is properly executed as a common-law deed where the attestation clause is in the form, "in witness whereof the said G Company have caused this indenture to be signed by their president, and attested by their secretary, and the common seal to be affixed," and is correspondingly signed and sealed.² But, on the other hand, where a president of a corporation was authorized by resolution to execute a deed conveying real estate of the corporation, and he did so in the name of the corporation, but attested it in the words "in witness whereof I, president, have hereunto set my hand and seal," etc., and signed his own name as president, opposite to a seal upon which no distinct impression appeared, the conveyance was held to be the individual deed of the president; and as he had personally no interest in the lands conveyed, the deed was inoperative.³

fully convey as the president and trustee of the Four Lake Company." The court said its view of the matter was further strengthened by the covenants which were on the part of himself and his constituents.

¹ *Haven v. Adams*, 4 Allen, 80. An instrument which throughout the body thereof purported to be a mortgage of personal property by a corporation, was held to be the deed of the corporation, notwithstanding it was signed by the president only with his own name and title, and was sealed with his individual seal: *Sherman v. Fitch*, 98 Mass. 59. See, also, *Eureka Co. v. Bailey Co.*, 11 Wall. 488; *McCollin v. Gilpin*, 5 Q. B. D. 390. If the name of the corporation is signed to the deed, the words "president and directors" preceding the corporate name, may be regarded as surplusage: *Shaffer v. Hahn*, 111 N. C. 1. See, also, *Murphy v. Welch*, 128 Mass. 489; *Kansas v. Hannibal & St. Jo. R. R. Co.*, 77 Mo. 180; *Bason v. Kings Mountain M. Co.*, 90 N. C. 417; *Frostbury Mut. B. Assn. v. Brace*, 51 Md. 508.

² *Bason v. King's Mountain Mining Co.*, 90 N. C. 417. See, also, *Magill v. Hinsdale*, 6 Conn. 464; 16 Am. Dec. 70; *Porter v. Andros-coggin & K. R. Co.*, 37 Me. 349; *Osborne v. Tunis*, 25 N. J. L. 633; *Moore v. Willamette T. & L. Co.*, 7 Or. 355. But a deed defectively executed may be good in equity: *Love v. Sierra Nevada etc. Co.*, 32 Cal. 639; 91 Am. Dec. 602.

³ *Tenney v. East Warren Lumber Co.*, 43 N. H. 343. See, also, *Coburn v. Ellenwood*, 4 N. H. 99; *Brinley v. Mann*, 2 Cush. 337; 48 Am.

§ 336. **Seal incident to a corporation.**—It has been said that incident to all corporations is the right to have and use a common seal.¹ This incident exists without any provision in the charter, and the corporation may adopt any seal it desires.² But the seal must be that of the corporation to bind it by deed. It is, therefore, held that a conveyance under the private seal of an agent of the corporation does not bind it as a deed; but for the benefits received they may be made to respond in implied *assumpsit*.³ And the deed must be under its corporate seal, which it may alter at pleasure, or it may adopt the private seal of an individual; but in that case the seal must be used as that of the corporation.⁴

§ 337. **What is a corporate seal.**—The common seal of a corporation, in one sense, is the instrument by which an impression is made upon the wax, wafer, or other substance used to take the impression. In another sense, the corporate seal is the impression itself. At common law, in order that an instrument might operate distinctively as one under seal, it was essential that the corporate seal should be impressed upon wax, wafer, or some other impressible and tenacious substance attached to the instrument; an impression directly upon the paper

Dec. 669; *State v. Allis*, 18 Ark. 269; *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431. Where a deed, however, concluded, "in witness whereof, the said B. C. S. Bank, by J. S., their treasurer duly authorized for this purpose, have hereunto set their name and seal," signed "J. S., Treasurer B. C. S. Bank," and sealed, it was held to be the deed of the corporation: *Hutchins v. Byrnes*, 9 Gray, 367.

¹ Angell & Ames on Corporations, § 216; Dillon on Municipal Corporations, § 130; Field on Corporations, § 279.

² Case of Sutton's Hospital, 10 Rep. 30 b. See *Porter v. Androscoggin & K. R. Co.*, 37 Me. 349.

³ *Tippets v. Walker*, 4 Mass. 597; *Brinley v. Mann*, 2 Cush. 337; 48 Am. Dec. 669; *Columbia Bank v. Patterson*, 7 Cranch, 304; *Metropolis Bank v. Guttschlick*, 14 Peters, 19; *Randall v. Van Vechten*, 19 Johns. 65; 10 Am. Dec. 193; *Savings Bank v. Davis*, 8 Conn. 191; *Haight v. Sahler*, 30 Barb. 218; *Hatch v. Barr*, 1 Ohio, 390; *Bank v. Rose*, 2 Strobb. Eq. 90; *Stinchfield v. Little*, 1 Greenl. 231; 10 Am. Dec. 65; *Decker v. Freeman*, 3 Greenl. 838; *Elwell v. Shaw*, 16 Mass. 42; 8 Am. Dec. 126.

⁴ *Richardson v. Scott River W. & M. Co.*, 22 Cal. 150.

was insufficient.¹ But this rule has been altered in most of the States by legislative action. And even in the absence of a statutory provision upon the subject, it may be asserted that the modern authorities recognize the impression of a seal, when required, made directly upon the paper, or parchment, as sufficient.² And a seal, which is not the corporate one, may be used with the assent of the directors.³

§ 338. Who has the power to convey for the corporation.—In general, the entire management and control of the affairs of a corporation are intrusted to a board of directors or other governing body elected by the stockholders, who as a body have usually the right to take no other part in the management of corporate affairs.⁴ When

¹ *Farmers' Bank v. Haight*, 3 Hill, 494, 495; *Mitchell v. Union Ins. Co.*, 45 Me. 104; 71 Am. Dec. 529; *Rochester Bank v. Gray*, 2 Hill, 227.

² *Corrigan v. Trenton Falls Co.*, 1 Halst. 52; *Hendee v. Pinkerton*, 14 Allen, 381; *Davidson v. Cooper*, 11 Mees. & W. 778; s. c. 13 Mees. & W. 343; *Carter v. Burley*, 9 N. H. 558; *Bank of Manchester v. Slason*, 13 Vt. 334; *Pillow v. Roberts*, 13 How. 472; *Connolly v. Goodwin*, 5 Cal. 220; *Follett v. Rose*, 3 McLean, 332; *Curtis v. Leavitt*, 17 Barb. 318; *Allen v. Sullivan R. R. Co.*, 32 N. H. 446; *Lightfoot & Butler's case*, 2 Leon. 21. See, also, *Haven v. Grand Junction R. R.*, 12 Allen, 337; *Woodman v. York etc. R. R.*, 50 Me. 549; *Royal Bank of Liverpool v. Grand Junction R. R.*, 100 Mass. 444; 97 Am. Dec. 115; *In re Sandilands*, Law R., 6 C. P. 411.

³ *Middlebury Bank v. Rutland R. R. Co.*, 30 Vt. 159.

⁴ *Union Turnpike v. Jenkins*, 1 Caines, 381; *United States Bank v. Dandridge*, 12 Wheat. 113; *Commonwealth v. St. Mary's Church*, 6 Serg. & R. 508.

"The great number of the members of which corporations aggregate usually consist, renders their undoubted right of contracting by vote, in general, extremely inconvenient; and accordingly their mode of contracting is through the intervention of agents duly authorized for that purpose. These are either persons specially appointed and authorized for the occasion, or, as is more common, the general officers and boards, as directors, managers, etc., existing within the corporation, elected, it is true, by the members, but usually deriving their ordinary powers from the charter or act of incorporation. This instrument frequently prescribes, too, their mode of action, and we need hardly add, that where this is the case, its injunctions must be rigidly pursued. In modern corporations created by statute, the charter ordinarily contemplates the business of the corporation to be transacted exclusively by a special body or board of directors; and the acts of such body or board, evidenced by

the corporate authority is thus vested, the stockholders have no power to make a deed or lease of the corporate property.¹ As an illustration, a conveyance was executed by the trustees of a corporation, who were authorized to do so by a resolution adopted at a special meeting of the stockholders, at which all the stockholders, including, of course, the trustees, were present. The conveyance recited that it was made by the corporation, by its trustees, "who are duly authorized and empowered by resolution and order of said corporation to sell and convey," and concluded, "in witness whereof, we, as the trustees of and for and on behalf of said corporation, have hereunto set our hands and seal (the said corporation having no seal), the day and year first above written." It was held that the power to sell corporate property, or to authorize its sale, is not vested in the stockholders, either when collectively assembled or acting individually; such power can be conferred only by the board of trustees, when assembled and acting in that capacity, and they may confer it upon themselves or any one else.² Where a corpora-

a legal vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal": Angell & Ames on Corporations, § 231.

¹ *Conro v. Port Henry Iron Co.*, 12 Barb. 27.

² *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 607. Speaking of the resolution of the stockholders, Sawyer, J., delivering the opinion of the court, said: "The corporation could only act—could only speak—through the medium prescribed by law, and that is its board of trustees. As well might the citizens of San Francisco, in public meeting assembled, by unanimous resolution, authorize certain supervisors designated by name to sell and convey the city hall. It is said, however, that the trustees were also all present and participated in the proceedings at the stockholders' meeting, and assented to the resolution; that the resolution was therefore approved by all of the constituents of the corporation, and the powers of the corporation were exhaustively exercised. But they were acting in their individual characters as stockholders, and not as a board of trustees. In this character they were not authorized to perform a corporate act of the kind in question. As well, also, might a valid ordinance be passed by the citizens of San Francisco in public meeting assembled, at which the supervisors were all present and voted in the affirmative. Such an ordinance, when signed by the mayor, would have the assent of all the constituents of the corporation as clearly as the resolution in question has in the present instance. But such is not the

tion owns land, a deed executed by the sole stockholder therein in his own name is void. The directors must act as a board.¹ Where a deed made by a corporation to its president purports to have been made under a resolution of the board of directors, directing its execution by the president and secretary, and recites the presence of all of the directors at the meeting, it appears from the face of the deed that the president was a mere instrument, and the deed is not void as against public policy, because he executed the deed, as president of the corporation, to himself.²

mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the trustees when assembled and acting as a board. This is the mode prescribed. As a board they could perform valid corporate acts, and confer authority within the province of their powers upon the trustees individually, or upon any other parties to perform acts as the agents of the corporation." As to the necessity for the authority to execute the deed affirmatively appearing, the same justice observed: "It is claimed by respondents that no authority is shown in the parties executing to execute the deed on behalf of the corporation. If the deed of a natural person purporting to have been executed by an attorney in fact were offered in evidence, it would clearly be inadmissible without first showing the authority of the attorney. The recital of the authority in the deed itself would furnish no evidence whatever of its existence. The same is true of an artificial person—a corporation—at least where the corporate seal is not affixed. Whether the rule would be different when the regularly adopted corporate seal is shown by competent proof to be affixed, it is not necessary now to inquire; for it affirmatively appears in this instance that the corporation has no seal, and that the parties executing the instrument used their respective seals, no express authority to adopt such seals being shown. It may also be admitted for the purposes of this decision, that it is competent for the corporation to adopt the private seal of the several trustees, or any one of them, as its seal *pro hac vice*, and that the conferring upon the agent power to execute the deed, necessarily includes the power to adopt a seal on behalf of the corporation for the occasion. Still, as a seal regularly adopted by the corporation was not in fact used, it is necessary to show authority in the agent to execute the deed, in order to show by implication authority in him to adopt a seal for the occasion. The authority of the trustees to execute the instrument in question must, therefore, affirmatively appear, or it does not appear to be the act or deed of the corporation."

¹ Baldwin v. Canfield, 26 Minn. 43.

² Fudickar v. East River Irrigation Dist., 109 Cal. 29.

§ 339. Compelling directors to execute deed against their judgment.—The governing board possess the same power of executing deeds, as they do of performing any other corporate act. It is their province to determine whether a particular act will be done, and courts will not compel them to attach the corporate seal to any instrument, against their own judgment, though a majority of the members may so desire.¹

¹ *Commonwealth v. St. Mary's Church*, 6 Serg. & R. 508. See *Clark v. Benton Mfg. Co.*, 15 Wend. 256; *Leggett v. New Jersey Mfg. etc. Co.*, 1 Saxt. Ch. 541; 23 Am. Dec. 728; *McDonough v. Templeman*, 1 Har. & J. 156; 2 Am. Dec. 510. In *Leggett v. New Jersey Mfg. etc. Co.*, *supra*, where the validity of a mortgage was in question, the Chancellor said: "By the act incorporating the New Jersey Manufacturing and Banking Company, it is provided that all the affairs, property, and concerns of the corporation shall be managed and controlled by eleven directors, who shall be elected annually; and that the directors for the time being, or a majority of them, shall have power to make and prescribe such by-laws, rules, and regulations as to them shall appear needful and proper, touching the government of the said corporation, the management and disposition of the stock, business, and effects thereof, and all such other matters as may appertain to the concerns of said corporation. From this it appears that the general power over the affairs of the corporation was committed to the board of directors to be chosen by the stockholders. If the mortgage had been executed under the authority of that board, it would, in the judgment of the court, have been valid. But the evidence shows that it was not so executed. The board took no order or vote upon the subject; they have not consented, and many of them knew nothing of the transaction. If, then, the mortgage and bond could not be legally executed without the direct assent or order of the board, they cannot be valid instruments, even against the corporation, for such assent or order was never directly given. . . . I think it quite clear that the president and cashier, as such, had no power to execute in the name and in behalf of the corporation, the instruments in question. Their authority, although extensive, has limits. It may extend to all the ordinary and even extraordinary financial operations of the company, but it can by no presumption be taken to include the right to execute a conveyance of real estate. This is a transaction of rare occurrence. . . . It is not within the range of banking operations. It is the most solemn act that the corporation can perform, and it would be dangerous to communities and to corporations themselves, if the president and cashier, the ordinary officers of the corporation, could exercise a right of this character in virtue of the general powers of their office. Admitting that, in this instance, in consequence of the neglect or inattention of the board of directors, the duties of the officers were enlarged, and greater powers were committed to them, not expressly, but permissively, they

§ 340. **Execution of deed in mode prescribed by law or charter.**—But where it is provided that conveyances shall be made in a certain mode, or executed by certain officers, this must be done to make the instrument operative. Thus, if the charter of a corporation provides that a specified number of the directors shall be present at the making of a contract, a deed or contract executed in the absence of that number would not be valid; but the ministerial act of affixing the seal may be done by a less number.¹ A like rule prevails where it is provided by statute that a conveyance or mortgage by a corporation shall be executed by its president. The statute must be followed, and a deed or conveyance not executed in compliance therewith is not the deed of the corporation.² But the statute of North Carolina, providing that a deed of a corporation conveying land shall be signed by the president and two other members of the corporation, is construed as an enabling act and not as excluding the common-law mode of execution.³ It is not essential that the deed should be executed by the directors themselves, where they have the power of conveying. They may empower others to sign and seal the conveyance.⁴

§ 341. **Who may affix the seal.**—The seal should be affixed by an agent duly authorized for that purpose.⁵

would not be authorized to do an act of this kind. If they were even general agents for this corporation without limit from common usage, or the prescribed by-laws of the company, they would not have been authorized to sell and convey the real estate of the company without express authority: *Stow v. Wyse*, 7 Conn. 219; 18 Am. Dec. 99."

¹ *Berk's Turnpike Co. v. Myers*, 6 Serg. & R. 12; 9 Am. Dec. 402; *Hill v. Manchester Water Works*, 5 Barn. & Ald. 866; 2 Nev. & M. 573.

² *Warner v. Mower*, 11 Vt. 385; *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Wheelock v. Moulton*, 15 Vt. 519. So if the assent of a certain number of stockholders is required by the charter of a corporation, this assent must be obtained, or a mortgage executed otherwise will be void: *Cape Sable Co.'s case*, 3 Bland, 166.

³ *Bason v. King's Mountain Mining Co.*, 90 N. C. 417.

⁴ *Savings Bank v. Davis*, 8 Conn. 191; *Burrill v. Mahant Bank*, 2 Met. 163; 35 Am. Dec. 395; *Arms v. Conant*, 36 Vt. 744; *Bellows v. Todd*, 39 Iowa, 219.

⁵ *Koehler v. Black River Co.*, 2 Black, 715; *Jackson v. Campbell*, 5

Where no authority has been conferred by the board of directors upon the president and cashier of a bank to affix the seal of the corporation to an instrument, they have no power to do so.¹ The seal should be affixed by the officer who is entitled to its possession and custody, or by some person acting under special authority.² The acknowledgment of the execution of the deed should generally be made by the proper officer, or agent, executing the instrument.³ The seal is *prima facie* evidence that it was affixed by proper authority.⁴

§ 342. Rule that power to execute a deed must be by deed not applicable to corporations.—The rule of the common law is that authority to execute a deed can be conferred only by deed. This rule does not apply to corporations. They may appoint agents by resolution, or vote without the corporate seal.⁵ Therefore, the conveyance of corporate lands by an agent or attorney, appointed by a vote of the board of directors without a power under

Wend. 572; *Damon v. Granby*, 2 Pick. 345; *Bank of Ireland v. Evans*, 5 H. L. Cas. 389; 32 Eng. L. & Eq. 23; *D'Arcy v. Tamar*, Law R. 2 Ex. 161.

¹ *Hoyt v. Thompson*, 5 N. Y. (1 Seld.) 320. A by-law of a railroad corporation, constituting the president the business and financial agent of the company, does not empower him to execute a mortgage for a precedent debt of the corporation: *Luse v. Isthmus etc. R. R. Co.*, 6 Or. 125; 25 Am. Rep. 506.

² *Derby Canal v. Wilmont*, 9 East, 360; *Berk's Turnpike Co. v. Myers*, 6 Serg. & R. 12; 9 Am. Dec. 402; *United States Bank v. Dandridge*, 12 Wheat. 68; *Clarke v. Imperial Gas Co.*, 4 Barn. & Adol. 315; 1 Nev. & M. 206. A deed is admissible in evidence without additional proof of the capacity of the officers executing it, where it purports to be made by the corporation by its proper officers, and it is recited in the certificate of acknowledgment that they were such: *Shaffer v. Hahn*, 111 N. C. 1. See, also, *Smith v. Smith*, 62 Ill. 493; *Heath v. Big Falls Cotton Mills*, 115 N. C. 202; *Sawyer v. Cox*, 63 Ill. 130; *Ballard v. Carmichael*, 83 Tex. 355.

³ *Gordon v. Preston*, 1 Watts. 385; 26 Am. Dec. 75; *Lovett v. The Steam Saw Mill Assn.*, 6 Paige, 60; *Kelly v. Calhoun*, 95 U. S. 710, 712.

⁴ *McCracken v. City of San Francisco*, 16 Cal. 591.

⁵ *Hopkins v. Gallatin Turnpike Co.*, 4 Humph. 403; *Burr v. McDonald*, 3 Gratt. 215; *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 594; *Howe v. Keeler*, 27 Conn. 538; *Despatch Line etc. v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203; *Redfield on Railways*, §§ 113, 143; *Field on Corporations*, § 290; *Dillon on Municipal Corporations*, § 130; *Angell & Ames on Corporations*, § 224.

seal, is valid.¹ So authority may be given to the president of a corporation to execute a deed by a resolution passed at a general meeting.² Where an officer is authorized by a vote to sell and convey, he has power to execute a contract to sell at a day in the future.³

§ 343. **Proof of the corporate seal.**—The corporate seal is not evidence of its own authenticity. It must be proved, when an issue is raised by denying it.⁴ It is not necessary, however, that the proof should be made by the officer who affixed the seal, or by a person who saw the act performed.⁵ Anyone acquainted with the seal, or the device engraved upon it, may show that it is the corporate seal.⁶ Where the seal is affixed by the proper officer, as by the president, the act is *prima facie* evidence of his authority to do so,⁷ and of the assent of the corporation to

¹ *Savings Bank v. Davis*, 8 Conn. 191.

² *Burr v. McDonald*, 3 Gratt. 215. See, also, *Jackson ex dem. People v. Brown*, 5 Wend. 590.

³ *Augusta Bank v. Hamblet*, 35 Me. 491.

⁴ *Foster v. Shaw*, 7 Serg. & R. 163; *Den v. Vreelandt*, 7 N. J. L. 352; 11 Am. Dec. 551; *Farmer's Turnpike Co. v. McCullough*, 25 Pa. St. 303; *Jackson v. Pratt*, 10 Johns. 281; *Crossman v. Hilltown*, 3 Grant. Cas. 225.

⁵ *Moises v. Thornton*, 8 Term Rep. 304; *Foster v. Shaw*, 7 Serg. & R. 162; *Darnell v. Dickens*, 4 Yerg. 7.

⁶ *Moises v. Thornton*, *supra*; *City Council v. Moorehead*, 2 Rich. 430.

⁷ *Hopkins v. Gallatin Turnpike Co.*, 4 Humph. 403; *Chicago, Burlington etc. R. R. Co. v. Lewis*, 53 Iowa, 101; *Bliss v. Kaweah Canal Co.*, 65 Cal. 502; *Schallard v. Eel River Nav. Co.*, 70 Cal. 144; *McCracken v. San Francisco*, 16 Cal. 591; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 9 Am. Dec. 300; *Southern Cal. Colony v. Bustamente*, 52 Cal. 192; *Evans v. Lee*, 11 Nev. 194; *Yellow Jacket Silver M. Co. v. Stevenson*, 5 Nev. 224; *Levering v. Mayor*, 7 Humph. 553; *Heath v. Big Falls Cotton Mills*, 115 N. C. 202; *Bason v. Kings Mountain M. Co.*, 90 N. C. 417; *Shaffer v. Hahn*, 111 N. C. 1; *Wood v. Whelen*, 93 Ill. 153; *Reed v. Bradley*, 17 Ill. 321; *Union Gold M. Co. v. Bank*, 2 Col. 226; *Butts v. Cuthbertson*, 6 Ga. 166; *Solomon's Lodge v. Montmollin*, 58 Ga. 547; *Flint v. Clinton Co.*, 12 N. H. 430; *Crossman v. Hilltown Turnpike Co.*, 3 Grant's Cas. 225; *Blackshire v. Iowa Homestead Co.*, 39 Iowa, 624; *Morris v. Keil*, 20 Minn. 531; *Sheehan v. Davis*, 17 Ohio St. 571; *Berks & Dauphin Turnpike Road v. Myers*, 6 S. & R. 12; 9 Am. Dec. 402; *City Council v. Moorhead*, 2 Rich. 430; *Mickey v. Stratton*, 5 Sawyer, 475; *Conine v. Junction etc. R. R. Co.*, 3 Houst. 288; *Mill Dam Foundry v. Hovey*, 21 Pick.

the instrument.¹ Where the signature of the agent who acts for the corporation is proved, it will be presumed, until rebutted by competent evidence, that the seal was intended as the seal of the corporation.² It is not necessary to insert in a deed executed by a corporation a recital of the authority under which it is made, unless rendered essential by statute or otherwise.³ And a recital can have no effect where the authority did not exist.⁴

417; *Burrill v. Nahant Bank*, 2 Met. 163; 35 Am. Dec. 395; *New England Iron Co. v. Gilbert etc. R. R. Co.*, 91 N. Y. 153; *Hoyt v. Thompson*, 5 N. Y. 320; *Trustees Canandaigua Academy v. McKechnie*, 90 N. Y. 618; *Chouquette v. Barada*, 28 Mo. 491; *St. Louis Public Schools v. Risley*, 28 Mo. 415; 75 Am. Dec. 131; *Musser v. Johnson*, 42 Mo. 74; 97 Am. Dec. 316; *Union Bank v. Call*, 5 Fla. 409; *Augusta etc. R. R. Co. v. Kittel*, 52 Fed. Rep. 63.

¹ *Leggett v. New Jersey etc. Co.*, 1 N. J. Eq. (1 Saxt. Ch.) 541; 23 Am. Dec. 728; *Reed v. Bradley*, 17 Ill. 321. Where the corporate seal is not attached, the party relying on the deed has the burden of proof to show that it was authorized or ratified by a resolution of the board of directors: *Fudickar v. East Riverside Irrigation Dist.*, 109 Cal. 29.

² *Reynolds v. Trustees*, 6 Dana, 37; *Stebbins v. Merritt*, 10 Cush. 27; *Mill Dam Foundry v. Hovey*, 21 Pick. 428; *Flint v. Clinton Co.*, 12 N. H. 433; *City Council v. Moorehead*, 2 Rich. 430; *Phillips v. Coffee*, 17 Ill. 154; 63 Am. Dec. 357; *Susquehanna Bridge v. General Ins. Co.*, 3 Md. 305; 56 Am. Dec. 740; *Bank of Middlebury v. Rutland etc. R. R. Co.*, 30 Vt. 159; *Tenney v. East Warren etc. Co.*, 43 N. H. 343. See, also, *Miller v. Ewer*, 27 Me. 509; 46 Am. Dec. 619; *Bowen v. Irish Presb. Cong.*, 6 Bosw. 263.

³ *Hart v. Stone*, 30 Conn. 94; *Inman v. Jackson*, 4 Greenl. 237; *Farar v. Eastman*, 5 Greenl. 345.

⁴ *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 607. In *Union Gold Mining Co. v. Bank*, 2 Col. 226, it was held, that by showing there was no vote of the directors authorizing the execution of a deed, the presumption in favor of its validity would not be overcome, where it was made in the name of the corporation, had the corporate seal affixed, and was signed by the president. The decision was placed on the ground that, as large powers are often exercised by corporate officers with the tacit consent of the board of directors, authority might have been given without such vote. But in *Koehler v. Black River etc. Co.*, 2 Black, 715, it was held that the burden of proof was shifted upon those who relied upon the validity of a mortgage to show that the seal was properly affixed, when the officers of the corporation could not tell the time when it was attached, or the manner in which it was done. See *Perry v. Price*, 1 Mo. 664, 14 Am. Dec. 316, where it was held that, where a seal other than the corporate one is used, it must appear that it was adopted, for at least that occasion, as the corporate seal, or the corporation will not be

§ 344. Delivery of deed of corporation.—It is said that the delivery of a deed of a corporation is not necessary to its complete execution; that it is rendered complete by merely affixing the common seal. “If dean and chapter seal a deed, it is their deed immediately; but if, at the same time, they make letter of attorney to deliver it, this is not their deed till delivery.”¹ But this is true only where the complete execution of the deed was intended by the affixing of the seal. It cannot have this effect if the order for affixing the seal be accompanied with a direction to the clerk of the company to retain the conveyance in his custody until the accounts with the purchaser are adjusted.²

PART II.

MUNICIPAL CORPORATIONS.

§ 345. Mode of alienation prescribed in charter must be observed.—If the charter of a municipal corporation prescribes a particular manner for the disposition of the corporate property, the valid assent of the corporation to a transfer of its property can be given in that manner only. Thus, in California, where sales of corporate property were made pursuant to the provisions of a void ordinance, and where the city charter provided that such sales

bound, even if a majority of the board of directors afterward meet and attempt to ratify the transaction.

¹ Lord Hale's note to Coke upon Littleton, tit. 1, ch. 5, § 40, 36 a, n., 222, Butler & Hargrave's ed. See Dean and Chapter of Fernes, Davies, 116; 2 Leon, 97; 1 Vent. 257; 1 Lev. 46; 3 Keb. 307; 1 Kyd on Corporations, 268; Angell & Ames on Corporations, § 227.

² Derby Canal Co. v. Wilmot, 9 East, 360. The company brought an action in ejectment and recovered a verdict. Upon a motion to set it aside, Lord Ellenborough, C. J., answered, and the rest of the court agreed, “that, in order to give it effect, the affixing of the seal must be done with intent to pass the estate; otherwise it operates no more than feoffment would do without livery of seisin; whereas, here, though the seal was directed to be and was affixed to the instrument for form, yet it was with a reservation of any present effect to pass the title out of the company, as they did not choose to deliver over the possession of the conveyance till the accounts were settled between them and the purchaser.”

should be made at public auction, it was held that the retention of the money received, although it might place a liability upon the city to refund it to the purchasers, would not operate as a ratification of the sales; for, to give it this effect would be equivalent to saying that the city might sell at private sale. Upon this point the court observes: "Again, by the charter all sales of the city property were required to be made at public auction. This mode was essential to the validity of any sale. A ratification of an illegal public sale is, in effect, making a private one. The object of the ratification is to vest in the purchaser the title, as he had acquired none previously, and for that purpose to confirm to him the sale at the prices already offered; that is, to make a sale upon the consideration of the original bid. At public auction this could not be done, for the very essence of an auction sale is that every one is at liberty to bid, and that the property shall fall to the highest bidder. It could only be done by a private arrangement, and, as a consequence, could not be done at all by the common council under the instructions of the charter. The case would be different if the common council had possessed authority to dispose of the municipal property at private sale. They could then have said: We will confirm the previous proceedings; we will take the money already advanced, and what is to be advanced upon the bid, as the consideration, and transfer the title. But as the power of disposition could only be exercised in one way—by a direct vote or ordinance authorizing a public sale, after due advertisement of the time, place, and terms—no other mode could be adopted in its stead. Appropriation of the proceeds, proceedings upon the assumed validity of the sale, reference to the ordinance as having been passed, would not answer the requirements of the charter. The common council were not invested with any discretion to substitute a different mode for the disposition of the city's property in place of the one provided. A private proprietor, having full power over his own property, may ratify an unauthorized sale of the same made by a person

assuming to be his agent, without reference to its mode, whether made publicly or privately; he may in some instances be estopped from denying the act of the assumed agent after appropriating its benefits with the knowledge of the facts. So, the State may ratify the acts of her agents, upon a subject within the constitutional control of the legislature, when they exceed their powers. She may do this by legislation directly affirming the acts, or by legislation proceeding upon their assumed validity. The reason is obvious; there is no limitation as to the mode in which the State may give her assent, except that it must be by an act or resolution of her legislature. Not so with a municipal body under restrictions such as controlled the action of the common council of the city of San Francisco. They could give their assent to the sale of the city's property only in one mode.”¹ Where a stat-

¹ *Grogan v. San Francisco*, 18 Cal. 590, 608, per Field, C. J. See, on the same subject, *McCracken v. San Francisco*, 16 Cal. 592; *Pimental v. San Francisco*, 21 Cal. 351. In the latter case the court said, upon the question of the purchaser's right to the money paid by the city (p. 365): “The several cases stand simply upon this ground: The city has obtained the money of her citizens without any consideration, under a mistaken impression of her rights, and has appropriated it to municipal purposes, and they insist, and so we have held, that she is under these circumstances bound, both legally and morally, to refund it to them. The suggestion frequently made in the cases, that the claimants are taking advantage of a mere technical defect, and that had they remained contented with the sale they would not have been disturbed in their possession, is without force. That defect which vitiates entirely a sale, and leaves the title of the property in the city, can hardly be termed a technical one. It is a defect which goes to the substance of the whole transaction. Nor is it by any means certain that the bidders would have been left in undisturbed possession of the property had no question as to the validity of the alleged sale been raised. They could have no assurance that subsequent corporate authorities might not claim the property; or if the authorities did not move in the matter, that the creditors of the city might not attempt to subject the property to the satisfaction of their demands. But, independently of these considerations, it is enough to say that the bidders had a clear right to ask for a return of their money when they found that the title had not passed to them, and could not pass by the proceedings taken. They were not under any obligation to wait a moment. The money was paid for a present, not a future, transfer of the title.” In *Herzo v. San Francisco*, 33 Cal. 134, in a case of the same character, Rhodes, J., delivering the

ute authorizes the board in which the corporate authority of a city is vested to convey its lands, a majority of the members of such board may execute the deed.¹

§ 346. Effect of conditions in charter upon which alienation may be made.—If the charter prescribes a certain condition upon which the real estate of the municipal body may be sold, that condition must exist, or be performed, when performance is required, or the deed executed by the corporation will be void. Thus, where the charter declares that no real estate shall be sold “without the consent of the freeholders and other legal voters of said village, or the major part thereof, to be given at a public meeting duly notified,” this consent must be obtained, and a deed made without it will be void.²

§ 347. Restriction on alienation as affecting power to mortgage or lease.—A condition, however, that a vote of the citizens of the municipality shall be obtained before corporate property is sold and conveyed, does not, it seems, affect the power of the corporation to mortgage or lease city property without such vote. For instance, in a case in Iowa, the charter declared that the city council should have the custody, care, and management of all the corporate property, “with full power to purchase, hold,

opinion of the court, observed: “The first point is, ‘the conveyance of the lots of land, by the city of San Francisco to the appellant, was not void, but only voidable, and might ripen into a title. The appellant, therefore, had no cause of action until he made a reconveyance and surrender of that property to that city.’ Regarding the conveyance as voidable, doubtless the proposition could be successfully maintained; but concurring as we do in the decisions on this point, in the cases mentioned, that the sale and conveyance were *void*, we are bound to hold that the conveyance could not ripen into a title, and did not nor could vest in the purchaser any right, title, or interest in the lots; and that the purchaser having acquired from the city by virtue of the attempted sale neither the title nor the possession of the lots, he is not required to convey or transfer either to the city, prior to the commencement of an action to recover the purchase money.” See, also, *Satterlee v. San Francisco*, 23 Cal. 314.

¹ *San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 106.

² *Still v. The Trustees of Lansingburgh*, 16 Barb. 107, 112.

possess, and occupy the same for the use and benefit of said city and the inhabitants thereof." It also contained this limitation: "Provided that the city council shall not have power to sell any real estate belonging to the said city of Dubuque, unless the qualified voters thereof, in pursuance of ten days' previous notice given by order of the city council, and published in one or more newspapers printed in said city, setting forth the time, place, and purpose of voting, and there shall be a majority of written or printed ballots given expressing their assent thereto." This restriction was considered by the court to apply to an alienation of the title only, and did not affect the power to mortgage; and accordingly a mortgage made without the previous assent of the electors was held valid.¹ Concerning a provision of this kind upon the power to lease, it was said in the same state: "This inhibition upon the power of the council to dispose of and make sale of the real estate of the city, has reference to the transactions which shall result in parting with the title, and vesting it permanently and entirely in another. It never was intended that a stall in the market-house could not be leased without the authority of a majority of the legal voters."²

¹ *Middleton Savings Bank v. The City of Dubuque*, 15 Iowa, 394. Wright, J., delivering the opinion of the court, said (p. 410): "The sale contemplated in the restriction refers to an alienation, not a mere encumbrance. Under our law the legal title remains in the mortgagor. The mortgagee acquires no right to the property which can be attached, reached by the levy of an execution, nor that can be inherited. The mortgage is but a lien upon the land to secure the payment of a debt. The thought that the city property might thus indirectly be sold without a vote of the people, is entitled to but little weight, for the same thing might be accomplished by incurring a simple debt upon which judgment might be recovered, and the property sold under execution. And that a debt might be contracted without a vote is undenied. The publicity of the judicial proceedings and sheriff's sale would give ample opportunity for the detection of any fraud and the protection of the interest of the city by anyone interested. But in the case of a private, absolute sale, it was deemed wiser and safer to first take the opinion of the inhabitants, and thus remove the opportunity for fraud and speculation on the part of the city authorities." Baldwin, J., however, dissented from this view. See *Dr. Rayter v. St. Peter's Church*, 3 Comst. 238.

² *The City of Dubuque v. Miller*, 11 Iowa, 583, per Wright, J. See *Davenport v. Kelly*, 7 Iowa, 102.

§ 348. Presumption of regularity.—A deed executed by a municipality showing nothing on its face to render it invalid, will be presumed, when the corporation has power to alienate, to have been executed in pursuance of that power. The deeds need not recite the ordinances or resolutions, nor show on their face that the contingency authorizing the sale has occurred.¹ “If it were conceded,” says Wagner, J., for the court, “that the city of St. Louis, in disposing of her commons, occupied the position of a trustee, there might be some weight in the objection; but it is well settled that the rules that govern trustees in the execution of their trusts do not apply to city authorities. A deed by a trustee under a special power must recite the power, and show on its face that the contingency has happened which would authorize the sale. Not so with municipal officers acting under ordinances or resolutions of the law-making power of the corporation.”²

§ 348 a. Right to convey before dedication to public use.—When title is vested in a municipal corporation by a deed without limitation or restriction as to its alienation, the property may be conveyed at any time before it is dedicated to a public use.³ If the conveyance recites facts without whose existence the deed would be unauthorized, the recital is evidence of such facts, and other evidence is not necessary to support the deed.⁴ Where the charter or statute contains no restriction, the rule generally is that a municipal corporation has the incidental or implied power to alienate or dispose of its property, real or personal, of a private nature.⁵ Land purchased for a public common may be conveyed by a municipal corporation

¹ *Jamison v. Fopiana*, 43 Mo. 565; 97 Am. Dec. 414.

² *Jamison v. Fopiana*, *supra*.

³ *City of Fort Wayne v. Lake Shore and Michigan Southern Ry. Co.*, 132 Ind. 588; 32 Am. St. Rep. 277.

⁴ *Gordon v. City of San Diego*, 101 Cal. 522; 40 Am. St. Rep. 73.

⁵ 2 *Dillon Mun. Corp.*, 569; *Platter v. Board*, 103 Ind. 360; *Beach v. Haynes*, 12 Vt. 15; *Shannon v. O'Boyle*, 51 Ind. 565; *Newbold v. Glenn*, 67 Md. 489; *Reynolds v. Commissioners*, 5 Ohio, 204; *Board etc. v. Patterson*, 56 Ill. 111; *Jamison v. Fopiana*, 43 Mo. 565; 97 Am. Dec. 414.

before it is dedicated to public use,¹ but not after it has been actually dedicated.²

§ 349. **Same rule applies to municipality as to general government.**—It is said that so far as a consideration of this character is involved, a municipal corporation occupies a position similar to that of the United States. "When a deed from the United States is produced, the grantee is not bound to show that all the prerequisites of the law have been complied with. It is not incumbent on him, when he produces his patent, to prove that the land was surveyed, and that it was duly proclaimed for sale by the president, and that it was offered for sale at public auction. These are preliminaries to a patent which the law requires, but the production of the patent raises the presumption that these preliminary acts have been duly performed. Nor will our courts hear any objection from the opposite party on account of a defect in these prior proceedings, unless that party holds a conflicting title from the same source."³ And the same rule plainly applies where the authority to execute the deed is not derived from an ordinance, but from a statute. The deed need not recite the authority for its execution; it is sufficient if it appears upon the face of the instrument that it was made by the proper officer in his official capacity.⁴

§ 350. **Requisites and proof of deeds.**—In general, the same rules that govern the validity and proof of deeds

¹ *Beach v. Haynes*, 12 Vt. 15.

² *State v. Woodward*, 23 Vt. 92.

³ *Napton, J.*, in *Swartz v. Page*, 13 Mo. 603, 611. "The city of Carondelet having power to dispose of its common, the deed is presumed to have been executed in pursuance of that power, and it was unnecessary for the plaintiffs to show special authority by resolution or ordinance, and therefore the objections to the resolution introduced for that purpose are not to be considered": *Chouquette v. Barada*, 33 Mo. 249, 259, per *Bates, J.* See, also, *Flint v. Clinton Co.*, 12 N. H. 430; *Hart v. Stone*, 30 Conn. 94.

⁴ *Henry v. Atkison*, 50 Mo. 266. Where a commissioner had power only to convey the interest of the county, he is not authorized to insert a covenant of warranty: *Henry v. Atkison*, *supra*.

of private corporations apply to the conveyances of municipal corporations as well. This remark, however, is to be taken with the qualification explained in a preceding section, that where the statute confers a power to sell, and prescribes the mode in which that power shall be exercised, the execution of the deed must be made in strict pursuance of the power. Therefore, where the statute requires that the deed of a municipal corporation shall be signed by the persons executing it, proof that the deed was sealed and delivered by them is not sufficient.¹ Where a deed purporting to be the conveyance of a county was signed by the proper officer, who did not add his official designation, but wrote the word "agent" opposite his name, evidence to show that he was such officer at the time of the execution of the deed was de-

¹ *Osborne v. Tunis*, 1 Dutch. 633. The court on this proposition said (p. 661): "As a general rule, the deed of a corporation is proved by proof of its corporate seal. No signature by the corporators is necessary, though in practice it is usually attested by one or more of the officers of the corporation. The deed is complete without a signature. Proof that it is the deed of the corporation, therefore, is not equivalent to proving that it was signed by any one. If it be true in the case of a deed of an individual that it cannot be his deed without signing, or that his sealing includes his signature, neither principle applies to the deed of a corporation. The affixing of his individual seal by a grantor to a deed may import that he signed it, but the affixing of a corporate seal cannot import that all the corporators signed it, or that the proper officers signed it. The seal of the corporation is neither the seal of the individual corporators, nor of the officers. The deed in question is executed under the authority of a particular statute conferring special powers. The deed was given in execution of the power. The power must be strictly pursued. The statute requires that the deed shall be under the corporate seal, and shall be signed by the commissioners of the loan office. The corporate seal certainly does not prove that it was signed by the commissioners, nor does that fact appear in the formal proof of the deed. The proof would have been precisely the same if the commissioners had not signed it. If the proof contained in the certificate had been made in a court of justice by a living witness, it would have been radically defective. It certainly can have no greater efficacy because it is indorsed upon the deed. Where a statute has added an additional solemnity to the ordinary execution of a deed, it certainly cannot be presumed from the proof of the deed in the ordinary form that the additional solemnity was observed. If such a rule of construction is adopted, the statute becomes a dead letter."

cided to be admissible. "The whole deed runs in the name of the county," observes the court, "and shows that it is the county who sells; and can it be true that the party must lose his property because the agent has omitted to add to his name the description of office, when he was, in fact, such officer? But it is argued that the evidence offered tends to change or alter a written instrument. . . . The evidence is to show that Gardner was an officer—the clerk. The contract is by the county, and the clerk was the person authorized to execute it. Does this, in fact, tend to change or alter the contract? It seems, on the other hand, only to perfect it."¹ So, where a city charter authorized the appointment of a mayor *pro tempore*, a deed purporting to have been executed by a person occupying that position, and which was attested by the auditor and properly acknowledged, affords *prima facie* evidence that the person executing it was at the time acting in the capacity of mayor.²

¹ *Gourley v. Hankins*, 2 Iowa, 75, per Woodward, J. In that case the deed was signed: "In testimony whereof, I, Stephen B. Gardner, agent of the county of Johnson, in the state of Iowa, have hereunto set my name this ninth day of February, A. D. 1848. Stephen B. Gardner, agent of J. C." With regard to the authority of an officer, the general rule is, that where it comes incidentally into question in a proceeding in which he is not a party, proof that he was acting as an officer is sufficient, and the regularity of his appointment cannot be made an issue. If, however, he relies upon proof of a due election or appointment, the fact must be shown by legal proof: *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50; *Pierce v. Richardson*, 37 N. H. 306; *Bean v. Thompson*, 19 N. H. 290; 49 Am. Dec. 154; *Tucker v. Aiken*, 7 N. H. 113; *Burgess v. Pue*, 2 Gill, 254; *Blake v. Sturdevant*, 12 N. H. 573. General reputation is *prima facie* proof of the official character of an officer: *Johnson v. Stedman*, 3 Ohio, 94; *Potter v. Luther*, 6 Johns. 431.

² *Middleton Savings Bank v. The City of Dubuque*, 19 Iowa, 467. See, also, *Lovett v. Steam Saw Mill Assoc.*, 6 Paige, 54. In *San Diego v. San Diego L. & A. R. R. Co.*, 44 Cal. 106, it was held that where a board exercising the corporate authority of a city was authorized by an act of the legislature to convey its lands, a majority of the members of such board may make the conveyance. But a member of such board, if it have discretion in the matter, who is a stockholder in a corporation to which the deed is to be made, cannot take an official part in relation to the conveyance: *San Diego v. San Diego etc. R. R. Co.*, *supra*.

§ 351. Title cannot be conveyed by a simple ordinance or vote. — An ordinance which is not under the seal of the corporation, does not express a consideration, and is not delivered, cannot be a conveyance. For example, an ordinance was passed in these words: "Ordered that, for the future, whatever small strips of land are to be found between the outward lines of Front street and the water shall be the property of the person owning the front lot on the opposite side of the street." In an action of ejectment brought by the corporation it was decided that this ordinance could not operate as a deed, for the absence, among other things, of a seal of the grantors, and of a consideration from the grantees, even if the latter had been properly designated. In the course of the opinion it was said: "Viewing the ordinance in the light of a conveyance, we think it so obviously defective that it could not have misled a man of ordinary capacity. Besides the want of a seal and a consideration above mentioned, it is altogether informal, and does not appear ever to have been delivered to the pretended donees. The last is a decisive and fatal objection, without advert-ing to any others, because delivery is essential to give effect to any instrument of conveyance *inter vivos*, and must, in the very nature of things, be as necessary where the instrument is to operate only as color of title, as when it is to convey a complete title."¹ Nor can the title to lands of a town be passed by a vote without express authority; and when an agent conveys, under the authority of a vote, the deed should be made in the name of the principal.²

¹ Commissioners of Beaufort v. Duncan, 1 Jones (N. C.), 239, per Battle, J. The court held that it was of so little importance as a conveyance that it would not give color of title to the defendant as an element of adverse possession.

² Cofran v. Cockran, 5 N. H. 458; Coburn v. Ellenwood, 4 N. H. 99, 102. See Ward v. Bartholomew, 6 Pick. 409; De Zeeng v. Beekman, 2 Hill, 489. It has been said, *arguendo*, that a release by a municipality of an interest in real property and not by deed may be in a proper case enforced in equity: Wright, C. J., in Grant v. City of Davenport, 18 Iowa, 179, 189. As to the liability created by covenants of warranty where city has no title to convey, see Findler v. San Francisco, 13 Cal. 534.

CHAPTER XV.

EXECUTION OF DEEDS UNDER POWERS OF ATTORNEY.

- § 352. Capacity to appoint an attorney.
- § 352 a. Corporation acting as attorney.
- § 353. Powers of attorney by married women—Common-law rule.
- § 354. Common-law rule altered by statute.
- § 355. Delegation of authority.
- § 356. Authority to execute a deed must be by deed.
- § 356 a. Notice of grantor's rights from act of attorney.
- § 357. Contract of sale.
- § 358. Construction of powers of attorney.
- § 358 a. Situation of parties, and subsequent ratification.
- § 358 b. Agent for corporation.
- § 359. General terms limited by particular words.
- § 360. Illustrations of construction placed upon powers of attorney.
- § 361. Partition.
- § 362. Special instances of construction.
- § 363. Continued.
- § 363 a. Implied authority of attorney.
- § 364. Warranty deed under power of attorney—Comments.
- § 365. Decisions that attorney has no power to execute warranty deed.
- § 366. Cases holding attorney has such power.
- § 367. Mr. Rawle's views.
- § 368. Comments.
- § 369. Description of property to be sold.
- § 370. Power to sell imports sale for cash.
- § 371. Sale on credit must be reasonable credit.
- § 372. Power to sell does not authorize gift.
- § 372 a. Agent cannot sell to pay his own debts.
- § 373. Exchange not authorized by power to sell.
- § 374. Discretion of attorney whether land is to be used for specified purposes.
- § 374 a. Power of attorney to lay out ways.
- § 375. Revocation.
- § 376. Effect of sale by principal upon attorney's commissions
- § 377. Execution of deeds by attorneys in fact.
- § 378. Relaxation of this strictness.
- § 379. Proper mode of signature.
- § 380. Comments.
- § 381. Some illustrations.
- § 381 a. Conveying individual interest where power is given to several.
- § 381 b. Execution of power by a partnership.

§ 352. **Capacity to appoint an attorney.**—A person who has the absolute dominion over property has, generally, as an incident of this power, the right to dispose of it, and what he may do himself he may do by another. If he has the legal capacity to execute a deed, he has also, as a rule of law, the privilege of delegating to another the power to do this for him. But persons who are under some legal disability are incapable, either absolutely or partially, of appointing an attorney to execute a conveyance. Mr. Story says that infants, married women, idiots, lunatics, and other persons are thus incapable.¹ But Mr. Evans, referring to this statement of Mr. Story, says, with reference to the rule in England, that: "This cannot be accepted without qualification as the law of this country, for it has been distinctly laid down by the court of exchequer chamber, after a review of the cases, that when one of the parties to a contract is of unsound mind, and the fact is unknown to the other contracting party, no advantage having been taken of the lunatic, this unsoundness of mind will not vacate a contract, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored altogether to their original position. It is conceived that the same result would take place, if the contract were made through another who acted upon the authority of the lunatic, without having been aware or taken advantage of his state of mind."² But many of those who are

¹ Story on Agency, § 6.

² Evans on Agency, 10, citing *Milton v. Camroux*, 4 Ex. 17; *Beavan v. McDonnell*, 10 Ex. 184. But, on the general question, it is said by Mr. Justice Depue, in *Mathiessen etc. Co. v. McMahon's Admr.*, 38 N. J. L. 536, 546: "Notwithstanding the declaration of Chancellor Kent (2 Kent, 645), 'that the better opinion would seem to be that the fact of the existence of the lunacy must have been previously established by inquisition, before it could control the operation of the power,' the weight of authority, as well as sound reasoning, lead to the conclusion that the after-occurring insanity of the principal operates *per se* as a revocation or suspension of the agency, except in cases where a consideration has previously been advanced in the transaction which was the subject matter of the agency, so that the power became coupled with an interest, or where a consideration of value is given by a third person

disqualified from appointing agents are capable of acting as such in the execution of a naked authority to sell and convey.¹ The execution of a deed by an attorney in fact may be ratified by the principal by the personal delivery of the deed by him.²

§ 352 a. Corporation acting as attorney.—A corporation, when authorized by its charter, may act as an attorney in fact, and execute a deed as such.³ The contention was made that a corporation, from the nature of its organization as an artificial body, compelled to act through its agents, is incapable of executing a deed as an attorney in fact. But the court responded, "This argument is based on the assumption that there are some things, from the inherent nature of the case, that a corporation is incapable of doing, and seeks its illustrations in the common law, as that a corporation cannot be an administrator or executor, because its duties are of a personal nature and cannot be delegated, or to take an oath, when so required by law, before proceeding to execute some duty or trust. But the argument overlooks the fact that a corporation may be empowered to do by statute what it was incapable of doing under its common-law powers, and when thus created, its powers, capacities, and modes of exercising them depend upon the statute."⁴

§ 353. Powers of attorney by married women—Common-law rule.—A married woman can make a valid conveyance of her real estate only by executing a deed, either

trusting to an apparent authority in ignorance of the principal's incapacity: *Story on Agency*, § 481; *Bunce v. Gallagher*, 5 Blatchf. 481; *Davis v. Lane*, 10 N. H. 156." See, also, *Brown v. Goddrell*, 3 Car. & P. 30; *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170.

¹ *Story on Agency*, § 7; *Livermore on Agency*, § 32. See *Lyon v. Kent*, 45 Ala. 656.

² *Mowry v. Mowry*, 103 Cal. 314. See, also, *Ralphs v. Hensler*, 97 Cal. 296.

³ *Killingsworth v. Portland Trust Co.*, 18 Or. 351; 17 Am. St. Rep. 737.

⁴ *Killingsworth v. Portland Trust Co.*, 18 Or. 351; 17 Am. St. Rep. 737. See, also, *McWilliams v. Detroit etc. Co.*, 31 Mich. 275.

with or without the concurrence of her husband, as may be provided by statute, and acknowledging before some officer authorized to take acknowledgments, upon an examination separate and apart from her husband, that she executes the deed freely, without any compulsion on the part of her husband. The law requires this private examination in order that she may be protected from coercion on the part of her husband, and makes her acknowledgment a part of the deed essential to its validity. In this private examination, which is, in its nature, personal to her, another cannot act as her representative. It follows, therefore, that, unless the statute confers such authority upon her, a married woman cannot execute a valid and effectual power of attorney to convey an interest in real estate, and this is the rule that prevails at common law, and in a large number, if not in a majority, of the States.¹ A power of attorney executed by a hus-

¹ *Aiken v. Suttle*, 4 Lea (Tenn.), 103; *Sumner v. Conant*, 10 Vt. 9; *Holladay v. Daily*, 19 Wall. 606; *Holland v. Moon*, 39 Ark. 120; *Kearney v. Macomb*, 16 N. J. Eq. 189; *Clark v. Mumford*, 62 Tex. 531; *Earle v. Earle*, 1 Spenc. 347; *Lewis v. Coxe*, 5 Har. 301. A married woman cannot acknowledge a deed by an attorney in fact: *Dawson v. Shirley*, 6 Blackf. 531. In *Sumner v. Conant*, 10 Vt. 9, 20, the court, per Royce, J., say: "At common law a woman under coverture could make no conveyance of her lands except through the agency of a court of record. She could neither convey directly by deed, nor authorize any one to convey for her; all her present right to convey by deed is, therefore, conferred by statute. The requisites of a common deed of conveyance are prescribed by the fifth section of the act regulating conveyances. It must be 'signed and sealed by the party having good and lawful authority thereunto,' and signed by two or more witnesses, etc. The ninth section contemplates that such deed may be executed by attorney, and discloses some of the requisites of the power of attorney. The words are, 'such power having been signed, sealed, and acknowledged before a justice of the peace, by the party having lawful right to make the same.' Thus far the statute is applicable to all persons having a legal right to act under it, whether by conveying their lands directly, or empowering agents to convey. No personal disabilities are as yet mentioned or provided for. But the twelfth section relates exclusively to the case of a *feme covert* attempting to convey her lands by deed. The right is there given or recognized to convey 'by deed of herself and baron,' and, as a protection against any improper influence of the husband, her separate examination and acknowledgment are made necessary, and required to be certified upon the deed. The question now presents itself, whether

band authorizing an agent to sell and convey his land does not empower such agent, it is held, to join with the wife in a deed of land belonging to her. If it is neces-

this deed may not be executed through the instrumentality of a third person? Though it is generally true that what a person has a right to do in his own affairs, he may authorize another to do for him, yet this is by no means universally true. An infant may execute and deliver a deed of his land, which will be effectual in law, unless he afterward elects to avoid it, whilst his authority to another to deed for him is merely void: Reeves' Domestic Relations, 251. The disability of a *feme covert* is not founded, like that of an infant, upon a supposed want of discretion, but results from a legal subjection to her husband, which is presumed to deprive her of that freedom of will which is essential to the validity of contracts, and that this disability emphatically applies to the delegation of powers, is shown by the familiar case of an attorney to defend a suit whom, it is everywhere said, the wife cannot appoint. It is contended, however, that, in this instance, the statute has removed her disability. This proposition is defended on two grounds: *First*, that the power to convey and the deed executed by the agent, being parts of one entire conveyance, constitute the deed which the statute has authorized; *second*, that the right to convey, being expressly given, the power to create an intermediate agency should be upheld as one of the necessary or usual means for exercising that right. The first ground here taken would lead to a very free and loose construction of the statute. The power of attorney is strictly no part of the conveyance, but a mere qualification of the person who is to make it. Much less is it the deed of conveyance itself, of which alone the statute speaks. It is known that the power and deed are distinct instruments, not merely executed at different times, but acknowledged by different persons; the power by the party making it, and the deed by the agent who executes it. Such were the facts in this case, and how can it be maintained, except upon a subtle and strained construction of the act, that Martha Wentworth has ever executed and acknowledged the deed which professes to convey her estate? In our opinion, the terms of the statute do not justify a conclusion so wide of their apparent import. The remaining ground is open to most of the observations already made. I shall suggest but a simple additional objection, which consists in the inability of the wife to revoke a power of this description without the concurrence of her husband. Whether this consideration alone would be fatal to the power in every case, it is certainly of great and decisive force in the present. The power in question extended to all the rights, granted or reserved, to Gov. Wentworth throughout this State; the property to be affected was consequently large, and the business of the agency was doubtless expected to continue through a course of years. To sustain the power under such circumstances would be to place the valuable estate of a wife beyond her own control, and not unfrequently subject it to the waste of a faithless agent, or an unwise and improvident husband." And see *Steele v. Lewis*, 1 Mon. 48; *Eslava v. Lepretre*, 21 Ala. 504; 56 Am. Dec. 266; But-

sary that the husband should join in the conveyance, a joint deed of such agent and the wife is treated as a nullity, so far as her land is concerned.¹

§ 354. Common-law rule altered by statute.—The disability which the common law placed upon the wife has to a great extent been removed by legislation. In some States she is authorized by the express language of the statute to appoint an agent to convey her separate real estate, and in other States her power to do so is taken for granted, on the theory that what she is authorized to do for herself she may do by another. In Wisconsin, it was held that the husband might be the agent of the wife in transactions affecting her real estate, and under a power of attorney had authority to execute in her name a valid conveyance of her land.² “If it is no violation of the common-law principle of the unity of husband and wife, for the wife to act as the agent or attorney of her husband, the conclusion would seem irresistibly to follow, that it is no infringement of the same principle to allow the husband to act as the agent of the wife in cases where by law she is *sui juris* and capable of acting for herself. At common law, the separate existence of the wife was for many purposes merged in that of the husband, and she could do no act. Incapable of acting for herself, she could not appoint another to act in her stead. . . . The disability of the wife has in many respects been removed by statute, and she is now capable of acting not only by herself, but by an agent, with no express limitation upon her power of appointment. If the doctrine of unity does not stand in the way, as it seems it cannot, then we see nothing to prevent her making her husband her agent,

terfield v. Beall, 3 Ind. 203; Bocoock v. Pavey, 8 Ohio St. 270; Graham v. Jackson, 6 Q. B. 811; Gillespie v. Worford, 2 Cold. 632; McDaniel v. Grace, 15 Ark. 465; Wilkinson v. Getty, 13 Iowa, 157; 81 Am. Dec. 428. See, also, Hunt v. Johnson, 19 N. Y. 279; Caldwell v. Walters, 6 Harris, 78; 55 Am. Dec. 592.

¹ Toulmin v. Heidelberg, 32 Miss. 268.

² Weisbrod v. Chicago & N. W. Ry. Co., 18 Wis. 35; 86 Am. Dec. 743.

whenever she chooses to intrust him with the management of her affairs.”¹ In California, before legislation on the subject, the common law prevailed that a married woman could not execute a valid power of attorney.² But this power is now conferred by statute. Her power of attorney, however, is not valid unless acknowledged in the same manner as a deed of real property.³

§ 355. **Delegation of authority.**—It is a familiar principle that an agent has no general power to delegate his authority. The trust is personal. Hence, unless the power of attorney authorizes the substitution, the attorney must execute the power himself, and cannot appoint another as a subagent.⁴ A gave B a power of attorney to sell certain lands in a certain county, with power to appoint other agents or attorneys. B afterward executed a power of attorney to C to sell the same lands, which second power of attorney only authorized the latter to act in the name of B, and was signed by B in his own name, and contained no reference to his principal. C executed a deed by virtue of this power, but it was held in Virginia that the deed was a nullity, because the second power of attorney was not executed in the name of the principal. The decision was placed on the ground that the appointment of an attorney under the power should be executed with the same formalities, and in the same mode, as would be essential to the proper execution of a deed itself.⁵ An attorney, by a power of substitution and

¹ *Weisbrod v. Chicago & N. W. Ry. Co.*, *supra*, per Dixon, C. J. See *Gridley v. Wynant*, 23 How. 500; *Roarty v. Mitchell*, 7 Gray, 243; *Hardenburg v. Larkin*, 47 N. Y. 113.

² *Mott v. Smith*, 16 Cal. 533.

³ Cal. Civil Code, § 1094. See, also, *Dentzel v. Waldie*, 30 Cal. 138; *Dow v. Gould & Curry S. M. Co.*, 31 Cal. 629; *Racouillat v. Sansevain*, 32 Cal. 376; *Douglas v. Fulda*, 50 Cal. 77. A power of attorney executed by an unmarried woman is revoked by her subsequent marriage: *Judson v. Sierra*, 22 Tex. 365; 2 Kent's Com. 645; 3 Wash. Real Prop. 259.

⁴ *Bocock v. Pavey*, 8 Ohio St. 270; *Gillis v. Bailey*, 21 N. H. 149; *Lynn v. Burgoyne*, 13 Mon. B. 400; *Commercial Bank v. Norton*, 1 Hill, 505; *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367.

⁵ *Stinchcomb v. Marsh*, 15 Gratt. 202.

revocation contained in the instrument, is authorized only to substitute another to take his place, and perform his duties, as attorney for the principal. He is not authorized, while acting as agent, to substitute the judgment of another for his own.¹

§ 356. Authority to execute a deed must be by deed.

The law requires that a power of attorney to execute a deed should be in writing and of the same solemnity as the deed itself. "No man shall be divested of his interest in real estate, but by his own acts and operation of law; if any authority by parol may be shown, a man may be made to convey all his estate, and the conveyance rest entirely in parol."² "An agent should not have the power to do an act where the instrument giving him the power is incomplete—where it lacks a requisite which would be essential in performing the act itself. His authority should be co-extensive with the act to be done, and the instrument clothing him with the authority as complete as the deed which he is to give. It should be executed with the same formalities as are required in carrying out the will of the principal."³

¹ *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367.

² *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121, per Chief Justice Savage; *Videau v. Griffin*, 21 Cal. 389; *Tappan v. Redfield*, 5 N. J. Eq. 339; *McMurtry v. Brown*, 6 Neb. 368; *Wheeler v. Nevins*, 34 Me. 54; *Heath v. Nutter*, 50 Me. 378; *Davenport v. Sleight*, 2 Dev. & B. 381; 31 Am. Dec. 420; *Cadell v. Allen*, 99 N. C. 242; *Rowe v. Ware*, 30 Ga. 278; *Humphreys v. Finch*, 97 N. C. 303; *Rhode v. Louthain*, 8 Blackf. 413; *Davenport v. Parsons*, 10 Mich. 42; 81 Am. Dec. 772; *Smith v. Dickinson*, 6 Humph. 261; 44 Am. Dec. 306; *Smith v. Perry*, 29 N. J. L. 74; *Van Ostrand v. Reed*, 1 Wend. 424; *Shuetze v. Bailey*, 40 Mo. 69; *Logan v. Steele*, 4 T. B. Mon. 430; *Clark v. Graham*, 6 Wheat. 577.

³ *Gage v. Gage*, 30 N. H. 420. See, also, *Videau v. Griffin*, 21 Cal. 389; *Heinlin v. Martin*, 53 Cal. 321; *Smith v. Perry*, 29 N. J. L. 74; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Lawrence v. Taylor*, 5 Hill, 113; *Jackson v. Murray*, 5 Mon. 184; 17 Am. Dec. 53; *Clark v. Graham*, 6 Wheat. 577; *Rhode v. Louthain*, 8 Blackf. 413; *Gordon v. Bulkeley*, 14 Serg. & R. 331; *Butterfield v. Beall*, 3 Ind. 203; *Rowe v. Ware*, 30 Ga. 278; *Shuetze v. Bailey*, 40 Mo. 69; *Smith v. Dickinson*, 6 Humph. 261; 44 Am. Dec. 306; *Maus v. Worthing*, 4 Ill. 26; *McMurtry v. Frank*, 4 T. B. Mon. 39; *Kime v. Brooks*, 9 Ired. 118; *Wheeler v. Nevins*, 34 Me. 54;

§ 356 a. Notice of grantor's rights from act of attorney.—If a person assumes to act as the attorney in fact of the grantor, and signs a deed as such, such deed is sufficient to charge the grantee with notice of the character and extent of the grantor's interest in the property, and also of the pretended claim of agency at and preceding the time of purchase of the property by the grantee, and his title is accordingly subordinated to the grantor's interest.¹ This is in accordance with the general rule of notice. Thus, information from a recorder that the vendor had already executed a deed of the same property to another person, who had deposited his deed for record, but had withdrawn it before actual registration, is sufficient to charge a purchaser with notice of such prior unrecorded deed.² This question is discussed at length in another part of this work, but it may be stated briefly that notice of any interest is sufficient to bind a person, if it is of such a nature that a person of ordinary intelligence would act upon it in his own affairs.³

§ 357. Contract of sale.—But the purchaser may acquire an equitable estate where the power of attorney is defective for want of a seal.⁴ As a general rule, while a contract to sell real estate must be in writing, it may be executed by an agent whose authority is not under seal nor even in writing.⁵ But by statute in some of the States

Spofford v. Hobbs, 29 Me. 148; 48 Am. Dec. 521; *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529.

¹ *Solari v. Snow*, 101 Cal. 387.

² *Lawton v. Gordon*, 37 Cal. 202.

³ *Drey v. Doyle*, 99 Mo. 459; *Musgrove v. Bonser*, 5 Or. 313; 20 Am. Rep. 737; *Ringgold v. Waggoner*, 14 Ark. 69; *Booth v. Barnum*, 9 Conn. 286; 23 Am. Dec. 339; *Harrison v. Boring*, 44 Tex. 255; *Bradlee v. Whitney*, 108 Pa. St. 362; *Meier v. Blume*, 80 Mo. 179; *Bohlman v. Coffin*, 4 Or. 313; *State Bank v. Frame*, 112 Mo. 502; *Wilcox v. Hill*, 11 Mich. 256.

⁴ *McDonald v. Bear River Co.*, 13 Cal. 220; *Dutton v. Warschauer*, 21 Cal. 609; 82 Am. Dec. 765.

⁵ *Brown v. Eaton*, 21 Minn. 409; *Dickerman v. Ashton*, 21 Minn. 538; *Riley v. Minor*, 29 Mo. 439; *Baum v. Dubois*, 43 Pa. St. 260; *Rottman v. Wasson*, 5 Kan. 552; *Lawrence v. Taylor*, 5 Hill, 107; *McWhorter v.*

the authority of the agent to execute a contract for the sale of real estate must be in writing, subscribed by the party sought to be charged.¹ And this requirement is not complied with by the fact that the owner has written

McMahon, 10 Paige, 386; *Johnson v. Dodge*, 17 Ill. 433. See, also, *Clason v. Bailey*, 14 Johns. 484; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Champlin v. Parish*, 11 Paige, 406; *Moore v. Farrow*, 3 Marsh. A. K. 41; *Montgomery v. Dorian*, 6 N. H. 250. In *McWhorter v. McMahon*, 10 Paige, 386, 393, the Chancellor says: "It is insisted by the appellant's counsel, that to constitute a lawfully authorized agent to make a contract for the sale of land he must have a written authority. Such, however, was not the construction which had been put upon the former statute of frauds, and the revised statutes have not changed the law in this respect. The ninth section of the Act of February, 1787, for the prevention of frauds (1 R. L. of 1831, p. 78), required conveyances and leases which were to transfer an interest in lands *in presenti*, to be signed by the party, or by his agent lawfully authorized by writing, in order to render them valid, either at law or in equity. And the language of the tenth section was the same in this respect. But in the eleventh section, which related to executory contracts for the sale of lands, etc., the words 'by writing' were left out, so that it was only necessary that the agreement should be signed by an agent lawfully authorized. Under this section, and under the corresponding provision in the English statute of frauds, it had long been settled that to make a valid executory contract for the sale of lands, or of an interest therein, it was not necessary that the authority of the agent should be in writing, but only that the agreement itself should be in writing, and should be signed by him as such agent: *Coles v. Trecothick*, 1 Smith Rep. 233; *Barry v. Lord Barrymore*, 1 Schoales & L. 29; *Clinan v. Cooke*, 1 Schoales & L. 22; 1 Sugden on Vendors (10th Lond. ed.), 186. There is certainly some danger of fraud and perjury in permitting the authority of an agent to contract for the sale of the lands of another, to be established by parol. And the revisers proposed to remedy the supposed defect in the former law, by requiring that the agent who signed such a contract should be authorized by writing; and they reported the ninth section of the title of the revised statutes respecting fraudulent conveyances and contracts accordingly. But the legislature struck out the words 'authorized by writing,' which were contained in that section as it was reported by the revisers, and substituted the words 'lawfully authorized,' as contained in the previous statute on the subject. It is only necessary, therefore, to establish the fact by parol, that the person signing such a contract, as agent for the seller, was lawfully authorized to sign it as such agent. And the supreme court in the recent case of *Lawrence v. Taylor*, 5 Hill, 107, consider this as the proper construction of the revised statutes."

¹ Cal. Code Civil Procedure, § 1973; Gen. Stats. Neb. 1873, p. 392, § 5; *Morgan v. Burgen*, 3 Neb. 213.

letters to his son, showing merely that a certain real estate agent was employed by him to solicit and negotiate for prices, nor by the fact that the owner had sent a telegram to such agent requesting him "to hold on," in response to one from him asking if he would take a certain sum for the property.¹ Where title is claimed under a deed made under a power of attorney, the authority of the attorney to execute the deed must be shown.²

§ 358. Construction of powers of attorney.—While the general rule governing the interpretation of all contracts or written instruments, that the intention of the parties is to be considered in construing their language, applies to the construction of powers of attorney,³ yet powers of attorney are construed strictly, and the authority is never considered to be greater than that warranted by the language of the instrument, or indispensable to the effective operation of such authority.⁴ "Powers of attorney are, ordinarily, subject to a strict construction; or, rather, the authority given is not extended beyond the meaning of the terms in which it is expressed. A distinction is carefully observed between such powers and other powers created by deed or will, for the accomplishment of particular purposes. The purpose to be accomplished is more regarded in the latter than in the former class of powers, and a more liberal interpretation of the words creating the powers is allowed."⁵

¹ *Albertson v. Ashton*, 102 Ill. 50.

² *Hager v. Spect*, 52 Cal. 579. An attorney is not authorized to convey his principal's interest in the land to one claiming an interest in it, by virtue of a power of attorney authorizing him to bring suit for, settle up, compromise, release, obtain, or recover the interest owned by the principal in such land: *Conner v. Parsons* (Tex. Civ. App.), 30 S. W. Rep. 83. An attorney who is authorized to sell a land certificate is not authorized to sell the land on which the certificate is subsequently located: *Collins v. Durward*, 4 Tex. Civ. App. 339.

³ *Marr v. Given*, 23 Me. 55; 39 Am. Dec. 600.

⁴ This section was cited as authority in *Frost v. Erath Cattle Co.*, 81 Tex. 505; 26 Am. St. Rep. 831.

⁵ *Brantley v. Southern Life Ins. Co.*, 53 Ala. 554. In *Geiger v. Bolles*, 1 Thomp. & C. 129, it is said: "Powers of attorney and all special

§ 358 a. Situation of parties and subsequent ratification.—In determining between the parties, the construction to be placed upon a power of attorney, their situation at the time of the execution may be considered, and what they intended is to be gathered from the words used and all the circumstances under which it was written and acted upon.¹ Each case is to be determined by its own peculiar circumstances. If one of the joint owners of a tract of land gives the other owner a power of attorney to sell it, and the attorney claiming to act under the power executes a deed to a purchaser for a sum partly paid in cash, and the balance represented by notes and mortgages, the acceptance of the notes and mortgages by the donor of the power, and his insisting on their payment when due, is a ratification of the acts of the attorney, and he is estopped from asserting that the power of attorney was not sufficient to authorize the execution of a deed.²

§ 358 b. Agent for corporation.—But a corporation can give authority to an agent to sell its lands only through its board of directors when duly assembled, by a proper resolution, and can ratify an exercise of such authority only in the manner required for the grant of original authority. Acceptance of money by the corporation paid under the terms of the agreement, and the commencement of an action to recover money due by its terms, will not amount to a ratification of the con-

powers are to be construed strictly, and the general words are to be construed in reference to the particular terms which form the subject matter of the instrument, and in furtherance of, but in subordination to, the general power conferred." That powers of attorney are construed strictly, see, also, *Gouldy v. Metcalf*, 75 Tex. 455; 16 Am. St. Rep. 912; *Gilbert v. How*, 45 Minn. 121; 22 Am. St. Rep. 724; *Dworak v. More*, 25 Neb. 735; *Lamy v. Burr*, 36 Mo. 85; 88 Am. Dec. 135; *Brantley v. Southern Life Ins. Co.*, *supra*; *Rice v. Tavernier*, 8 Minn. 214; 83 Am. Dec. 778; *Berkey v. Judd*, 22 Minn. 287; *Greve v. Coffin*, 14 Minn. 263; 100 Am. Dec. 229; *Bliss v. Clark*, 16 Gray, 60.

¹ *Delano v. Jacoby*, 96 Cal. 275.

² *Delano v. Jacoby*, 96 Cal. 275. See, also, *Borel v. Rollins*, 30 Cal. 413; *Simson v. Eckstein*, 22 Cal. 595; 2 Herman on Estoppel, §§ 792, 793. See, also, § 361, *post*.

tract.¹ If in such a case, the corporation has not proceeded so as to be bound by its contract, the purchaser is not bound.² In the absence of a resolution passed by the board of directors when duly assembled, neither the president, secretary, nor any other person has authority to execute a mortgage of the property of the corporation.³ When the corporate seal is affixed, and the signatures of the officers are proven, it may be presumed that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it was affixed by proper authority. But in the absence of a seal, or of proof of facts from which the existence of a resolution of authorization may be inferred, the authority of the officers of a corporation to execute a conveyance can be established only by a resolution properly passed and entered in the books of the corporation.⁴

§ 359. General terms limited by particular words.

It results from the rules of interpretation applied to the construction of powers of attorney, that where authority is given to perform specific acts, and general terms are also employed, the latter are limited to the particular acts authorized by the power. For example, a person appointed an attorney with the following powers: "For me and in my name to superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself as he may deem proper and expedient; hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power." The court held that this instrument did not authorize a sale of real

¹ *Salfield v. Sutter County L. I. & R. Co.*, 94 Cal. 547.

² *Salfield v. Sutter County L. I. & R. Co.*, 94 Cal. 547.

³ *Alta Silver Min. Co. v. Mining Co.*, 78 Cal. 629.

⁴ *Southern California Col. Assn. v. Bustamente*, 52 Cal. 192. See, also, *Harding v. Vandewater*, 40 Cal. 78; *Gashwiler v. Willis*, 40 Cal. 78.

estate.¹ A transfer of real estate, particularly that acquired subsequently, cannot be sustained under a power "to attend to all business affairs appertaining to real or personal estate." The language is too indefinite for such a purpose.² An attorney in fact is not authorized to sell real estate under a power "to attend to the business of the principal generally," or "to act for him with reference to all his business."³ An authorization to the attorney to recover the maker's lawful part of a decedent's estate, "giving and granting thereby to his said attorney full power and authority to take, pursue, and follow such legal course for the recovery, receiving and obtaining the same, as he might or could do were he personally present; and upon the receipt thereof, acquittances and other sufficient discharges for him, and in his name to sign, seal, and deliver," does not enable the attorney to convey real estate.⁴

§ 360. Illustrations of construction placed upon powers of attorney.—An attorney was authorized "to

¹ *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235. Said Mr. Chief Justice Murray: "It requires but a glance at this instrument to perceive that no authority is contained in it to convey real estate. The power is limited and special, and cannot be extended by implication to other acts more important in their character than those expressly provided in the body of the instrument. The rule may be thus stated; that where the authority to perform specific acts is given in the power, and general words are also employed, such words are limited to the particular acts authorized." And see *De Rutte v. Muldrow*, 16 Cal. 505.

² *Lord v. Sherman*, 2 Cal. 498. See, also, *Washburn v. Alden*, 5 Cal. 463; *Johnson v. Wright*, 6 Cal. 373; *Rountree v. Denson*, 59 Wis. 522; *School District v. Ætna Ins. Co.*, 62 Me. 330; *Reynolds v. Rowley*, 4 La. Ann. 396; *Boykin v. O'Hara*, 6 La. Ann. 157; *Maynard v. Mercer*, 10 Nev. 33; *Ferreria v. Depew*, 17 How. Pr. 418; *Wicks v. Hatch*, 62 N. Y. 535; *Lawrence v. Gebhard*, 41 Barb. 575.

³ *Coquillard's Administrator v. French*, 19 Ind. 274, 287. The power to acknowledge a deed for registration is conferred by implication under a power to execute it: *Robinson v. Mauldin*, 11 Ala. 977.

⁴ *Hay v. Mayer*, 8 Watts, 203; 34 Am. Dec. 453. Authority to represent the principal in all that concerns his interests in the State of California, and letters subsequently written speaking of the propriety of a sale of the land, do not authorize the attorney to bind the principal by a contract of sale: *Treat v. De Celis*, 41 Cal. 202.

bargain, sell, grant, release, and convey to such person or persons, and for such sum or sums of money, as to my said attorney shall seem most for my advantage, and upon such sale or sales, convenient and proper deeds, with such covenant or covenants, general or special, of warranty or quitclaim, or otherwise, as to my said attorney shall seem expedient, in due form of law as my deed or deeds, to make, seal, and deliver, and acknowledge." The instrument, however, did not mention what was to be sold or conveyed. The attorney acting under this power conveyed land belonging to his principal, and the grantee entered into possession of it, and retained this possession for nearly twenty years. During all of the time the grantee was in possession under his deed, the grantor never claimed or asserted title to the land. It was held in an action demanding the premises against one who had no title under the grantor, that it was the intention of the grantor to enable his attorney to sell and convey all the former's rights in any real estate owned by him.¹ An agent was appointed with these powers: "For me and in my name, to purchase all kinds of goods, wares, and merchandise, to execute all kinds of notes and obligations therefor; also for me, and in my name, to sell goods or barter the same, and receive pay therefor; to collect, deposit, draw for, and exchange money; also to buy and sell real estate, and in my name to receive and execute all necessary contracts and conveyances therefor. And further to do all things necessary to the transaction of a general mercantile trading, money loaning, and other lawful and proper business." It was held that this power did not authorize the attorney to sell and convey land to which, as disclosed by the records, the principal before the execution of the power had acquired title.²

¹ *Marr v. Given*, 23 Me. 55; 39 Am. Dec. 600.

² *Greve v. Coffin*, 14 Minn. 345; 100 Am. Dec. 229. The court, per Berry, J., said: "The business was one in which the attorney was to make the *original investments*, and to sell the goods or real estate acquired by such investments. This appears to us to be the natural signification of the language used in the connection in which it is used: See

A principal appointed a person to be "my true and lawful attorney, hereby confirming all sales, bargains, leases, or contracts of all descriptions whatsoever which he may make in my name and behalf, and empowering him to act in all cases in which I may be concerned as if I were present." It was held that this instrument conferred the power to sell land and execute deeds therefor.¹

§ 361. **Partition.**—An attorney is not authorized to make partition of lands in which his principal holds an interest as tenant in common, under a power of attorney authorizing the attorney to sell the principal's lands, and to perform all acts to carry this power into execution.² But if the attorney does make such partition, the principal may subsequently give effect to the partition by executing deeds made on the basis of the legal validity of the partition.³ As in other cases, a principal may ratify

Mills v. Carnley, 1 Bosw. 259. It is urged that this construction would furnish a bad and unreasonable rule, because it would require the purchaser to ascertain whether the attorney had *bought* the real estate which he assumed to sell, and that this is a matter which it would be almost, if not quite impossible, to determine with certainty. Whether this would be so in any instance or not we need not inquire. In cases like this which we are considering, no such difficulty would present itself, for the records of title (as appears by the finding) show that the premises in question were purchased by Levi Greve *before* the power of attorney was made."

¹ *Sullivan v. Davis*, 4 Cal. 291.

² *Borel v. Rollins*, 30 Cal. 408.

³ *Borel v. Rollins*, 30 Cal. 408. Chief Justice Currey, in delivering the opinion of the court said: "The power of attorney from Tracy to Pratt did not, in our judgment, authorize the attorney to make partition of lands in which Tracy had an interest as tenant in common. He was authorized under certain circumstances to sell any portion or all of the lands of the constituent, and the same to convey, and generally to do whatever in the premises was necessary to carry the power granted into execution, even though the matters to be done should require more special authority than was comprised by the language employed. But, notwithstanding the power of attorney when understood according to its language and obvious intent did not authorize the attorney to join in the partition in the name of his principal, we think there can be no question as to the power of the principal himself to give effect and confirmation to the acts of the attorney by his own acts and conduct of solemn significance, such as the execution of deeds of conveyance, which

the unauthorized acts of his agent in the sale of land, and such ratification may be inferred from long continued silence.¹

§ 362. **Special instances of construction.**—It is held that an agent who has power to “sell” lands has not merely as such agent the power to execute a deed. He has the power to bind his principal to convey, but cannot himself execute the conveyance, unless properly authorized by a power of attorney.² A power to sell does not authorize the execution of a deed of trust, with power to the trustees

necessarily recognized the partition as of legal validity. It may be assumed that Pratt exceeded his power when he made partition with the others, claiming to be tenants in common of the block, as the attorney in fact of Tracy, but what he did, though in excess of the power granted, it was proposed to prove his principal ratified and confirmed by acting in reference to and treating the partition as made by authority. In *Jackson v. Richtmyer*, 13 Johns. 367, the court held that an agreement relating to a third person in the name of one of the parties, who it did not appear had any authority to execute it, was ratified by the subsequent acts of the party in whose name it was made. The judgment of the supreme court in this case was confirmed by the court of errors, in which Chancellor Kent delivered the opinion of the court: *Jackson v. Richtmyer*, 16 John. 323–325. See, also, *Baker v. Lorillard*, 4 Comst. 257. It may be said that where the adoption of a particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner; and therefore that, as the authority to execute deeds upon partition must be under seal, there can be no parol ratification of a deed without authority under seal. This is certainly the doctrine of the law. But it is also the doctrine of the law that an act which operates as an estoppel *in pais*, such as accepting the benefit of the partition attempted to be made, and dealing with the property allotted to the principal by the partition as to his own by disposing of it by deeds, confirms the partition made by the attorney without legal authority: 1 Am. Lead. Cas. 574.”

¹ *Alexander v. Jones*, 64 Iowa, 207; *Hayes v. Steele*, 32 Iowa, 44.

² *Force v. Dutcher*, 18 N. J. Eq. 401. A person cannot convey land under a compromise made by him, where he is employed to rent, lease, and do everything with respect to real estate “short of selling the same,” to adjust an interest in a joint estate, and to make any necessary compromise or arrangement in regard to it: *Wells v. Heddenberg* (Tex. Civ. App.), 30 S. W. Rep. 702. For cases in which powers of attorney have been construed, see *Bell v. Corbin*, 136 Ind. 269; *Harris v. Johnston*, 54 Minn. 177; *Bradley v. Whitesides*, 55 Minn. 455; *Union Switch & S. Co. v. Johnson etc. Signal Co.*, 10 C. C. A. 176; 61 Fed. Rep. 940; *Smith v. Glover*, 50 Minn. 58; *McLaughlin v. Wheeler*, 1 S. D. 497; *Portland*

to sell the trust estate as they may deem advisable.¹ A principal appointed a person, "my true and lawful attorney in fact for me and in my name, to transact all my business of every kind and description, to collect and receipt for all moneys due and owing to me, and to sell and dispose of all my property, real and personal, for such price and on such terms as he may choose, whenever he may think it advisable to make such sale, hereby ratifying and confirming all such acts of my attorney." The attorney conveyed to a trustee all the property of the principal in trust to secure and pay off the creditors and sureties of the latter. It was held that the attorney had power to execute this trust deed, and hence, that the trustee took a good title to the property.² An attorney had

Trust Co. v. Coulter, 23 Or. 131; *Penfold v. Warner*, 96 Mich. 179; *Weare v. Williams*, 85 Iowa, 253; *Cox v. Manvel*, 50 Minn. 87; *Morris v. Woods*, 89 Va. 873.

¹ *Smith v. Morse*, 2 Cal. 524.

² *Lamy v. Burr*, 36 Mo. 85; 88 Am. Dec. 135. The court, per Wagner, J., said: "The general rule is that the power must be pursued with legal strictness, and the agent can neither go beyond it nor beside it; in other words, the act done must be legally identical with that authorized to be done. But in all cases, the authority should be construed and the intention of the principal should be ascertained in reference to the purpose of the appointment, and a consideration of the object which the agent is directed to accomplish will either expand the powers specified as a means of executing it, or limit the exercise of the most general powers conferred. Accordingly, it is a general maxim, applicable to special and limited agencies, as well as to those which are more comprehensive and discretionary, that, in the absence of special instructions to the contrary, and in the absence of such prescription of the manner of doing the act as implies an exclusion of any other manner, and authority or direction to do an act or accomplish a particular end, implies and carries with it authority to use the necessary means and inducements, and to execute the usual, legal, and appropriate measures proper to perform it. The principal authority includes all mediate powers which are necessary to carry it into effect. A direction or authority to do a thing is a reasonable implication of the powers necessary to accomplish it, unless there is a special restriction, or unless an intention to the contrary is to be inferred from other parts of the authority: 1 Am. Lead. Cas. 563; *Rogers v. Kneeland*, 10 Wend. 218; *Peck v. Harriott*, 6 Serg. & R. 145; 9 Am. Dec. 415; *Bayley v. Wilkins*, 7 Com. B. 886. It will be seen that the power of attorney in this case is of the most comprehensive character; it gives the agent full authority to transact all business of every kind and description, to collect and receipt for all moneys due, and

power to mortgage or convey land for the payment of debts. He, however, executed a deed transferring the land to a trustee, in trust, to secure certain specified creditors, and then to pay all the debts of the principal. A provision was inserted in the trust deed excluding from its benefit all creditors who should commence actions on their claims. It was held that the provisions in the trust preferring certain creditors, and declaring a forfeiture for bringing suit, were in excess of the authority of the attorney and hence void. But the deed was held to be valid in other respects, and was construed as being for the benefit of all creditors *pro rata*.¹ A power to sell land is not given by an authority to locate and survey land.² The owner of an unconfirmed Mexican grant executed a

to sell and dispose of all property, both real and personal, for such price, and on such terms, and at such time as he might deem advisable. The attendant circumstances leave little room to doubt what power was intended to be given. Brand was absent from his home, with no intention or prospect of returning; he had left a large amount of business unsettled—property liable to go to decay, and be destroyed, and creditors anxious to secure their debts. He therefore executed a power of attorney, giving his agent full authority to transact all his business of every kind and description; and this power must be interpreted, and the true intention arrived at, by a direct reference to the nature of the business to be transacted. There can be no doubt that the main business to be transacted was the application of the property to the payment of the debts. If there was no intention to vest the agent with authority to pay off the debts, why the enlarged and general power to transact all business in addition to the power to sell and dispose of property? But if the power was given to pay debts, was the making of the deed of trust a proper execution of it? We think it can be implied in this case without doing violence to any legal principle. The deed of trust was certainly just and equitable to the creditors, as it distributed the proceeds of the property ratably among them. If it was a fit and appropriate mode of carrying out the purpose of transacting all the business, it was competent to resort to it.”

¹ Gimmell v. Adams, 11 Humph. (Tenn.) 283.

² Moore v. Lockett, 2 Bibb, 67; 4 Am. Dec. 683. Where a wife is given by her husband a power of attorney to transact all business connected with “buying, selling, transferring, or mortgaging real estate,” including the signing and delivery of all necessary papers, she is not authorized to convey land in consideration of the grantee supporting her infant daughter until she arrives at majority: Portland Trust Co. v. Coulter, 23 Or. 131.

power of attorney, which, after reciting the appointment, said: "I give him full, complete, and perfect power, as my said attorney in fact, to do any and everything to secure my title to said rancho, and to prosecute the pretension of the same in all the courts of the United States; and by this I ratify, confirm, and approve all the doings of my said attorney in fact concerning said rancho." The court held that the agent did not have power under this authority to sell the land, or any part of it, or power to execute a contract which would obligate the principal to convey the rancho, or any portion of it.¹

§ 363. Continued.—A principal executed, as he supposed, a valid power of attorney to sell land, but the power was worthless. He then left the state, and subsequently wrote to his agent: "I have now an offer, and if it is come up to by the fellow, I shall close things very soon and be off, but shall go to Vermont first for a little while. *I want you to sell some of my lots*, or advance the means to meet this

¹ Blum v. Robertson, 24 Cal. 127. The court said: "In order to bind the principal in such case, it must appear that the act done by the agent was in the exercise of the power delegated, and within its limits: Mech. Bank v. Bank of Columbia, 5 Wheat. 326. No man can be bound by the act of another, without or beyond his consent; and where an agent acts under a special or express authority, whether verbal or written, the party dealing with him is bound to know at his peril what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal authority, the act, so far as it concerns the principal, is void. This is a rule of the common law, and is indeed elementary in the doctrine of powers: Beals v. Allen, 18 John. 363; 9 Am. Dec. 221; Hubbard v. Elmer, 7 Wend. 446; 22 Am. Dec. 590; Rossiter v. Rossiter, 8 Wend. 494; 24 Am. Dec. 62; North River Bank v. Aymar, 3 Hill, 263; Cox v. Robinson, 2 Stewt. & P. 91; Stow v. Wise, 71 Conn. 214; 18 Am. Dec. 99. The power of attorney under consideration authorized Casimero to take all the necessary steps, and do all necessary things to secure the right, title, and claim of Mrs. Valencia to the ranch therein mentioned, and to employ lawyers, gather testimony, and to provide the necessary expenses for the same. A sale of the land, or part of it, does not appear to have been contemplated by Mrs. Valencia. If it was, she entirely failed to express any such intention, or to confer on her attorney any power to convey or contract in her name, or otherwise to convey any portion of it; and it is not competent for courts to bind her by the acts of another to perform an obligation which she never incurred."

administration act before the year expires, which I send you by mail, accompanied by the vouchers, etc. *You can sell such lots as you see fit*, retaining enough to pay Judge G. for the first purchase money. It might be best to cut them up so as to sell in small lots. But you judge of this." It was held that by this letter the attorney was authorized to sell at his discretion, and that if a deed made by him was not good as a deed, it was good as a contract by the principal for a conveyance.¹ An instrument signed "S. A. Phillips, Executrix," is valid as a power of attorney, which is in the form: "This is to certify that C. D. is appointed my legal and lawful agent to sell any of my lands in Tallapoosa county to M. G., and to sign my name to any deed or bond, and it shall stand good in law as though I had signed it myself."² Where a power to sell is given, the power to convey is implied, if this construction is consistent with the whole instrument.³ A power to sell land is not conferred by a power of attorney

¹ *McNeil v. Shirley*, 33 Cal. 202. It was held in *Fay v. Winchester*, 4 Met. 513, that an attorney who is authorized to sell any of his principal's real estate is empowered to sell real estate which was acquired after the execution of the power of attorney. Where an authority is conferred upon several persons, the general rule in all cases is, that all must act to make the deed effectual, unless a contrary intention appears from the instrument which confers the power: *Sinclair v. Jackson*, 8 Cowen, 543; *Green v. Miller*, 6 Johns. 39; 5 Am. Dec. 184; *Cedar Rapids R. R. Co. v. Stewart*, 25 Iowa, 115; *Franklin v. Osgood*, 14 Johns. 553; *White v. Davidson*, 8 Md. 169; 63 Am. Dec. 699. But, of course, the rule is different when the power is given to several persons, jointly and severally. Where a husband and wife authorize an attorney to sell "all real estate belonging to us or either of us," and subsequently the husband conveyed his interest in the land to his wife, she previously having an only inchoate right of dower, and the land after the death of the husband was sold under the power, it was held that no title passed thereby, because the attorney was empowered by the wife to convey only such title as she possessed when the power was executed, and that when she became the owner of the fee by the deed from her husband, the inchoate right of dower was merged, and, consequently, there was nothing on which the power could be exercised: *Penfold v. Warner*, 96 Mich. 179; 35 Am. St. Rep. 591.

² *Phillips v. Hornsby*, 70 Ala. 414.

³ *Hemstreet v. Burdick*, 90 Ill. 444; *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715.

"to act in all my business in all concerns as if I were present myself, and to stand good in law, in all my land and other business."¹ Where conveyances have been made by the attorneys within the expressed terms of the power, the principal cannot contend, after sanctioning the sales by accepting the proceeds, that the sales were not authorized by the power.² A power of attorney executed by the owner of an unconfirmed Mexican grant, giving the attorney "full and complete power as my said attorney in fact, to do any and every thing to secure my title to said rancho, and to prosecute the pretension of the same in all the courts of the United States, and by this I ratify, confirm, and approve all the doings of my said attorney in fact concerning said rancho," does not authorize the attorney to sell any portion of it, or enter into a contract binding the principal to convey it.³ If an agent is authorized to sell land for a specific sum, an agreement made by him purporting to bind his principal to sell for a less sum and to pay the taxes upon the land, will not bind his principal, unless he, with full knowledge of the material facts, consents to and ratifies the agreement.⁴ If an attorney in fact has power to satisfy mortgages, and to make, execute, and deliver such written instruments as may be necessary for that purpose, he has no authority to satisfy a mortgage until the debt, for which it is security, is paid.⁵

§ 363 a. Implied authority of attorney.—An attorney authorized to purchase lands for a corporation is not authorized to submit to arbitration the matter of fixing the price to be paid for the land.⁶ Where a person is

¹ *Ashley v. Bird*, 1 Mo. 640; 14 Am. Dec. 313. For a case in which letters had passed between a principal and an agent concerning the sale of property, and in which it was held that under the circumstances of the case the agent had no power to make a sale without submitting the proposition to his principal, see *Burlington, Cedar Rapids etc. Ry. Co. v. Sherwood*, 62 Iowa, 309.

² *Vaughn v. Sheridan*, 50 Mich. 155.

³ *Blum v. Robertson*, 24 Cal. 127.

⁴ *Holbrook v. McCarthy*, 61 Cal. 216.

⁵ *Hutchings v. Clark*, 64 Cal. 228.

⁶ *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367.

authorized to borrow money and secure its payment by a mortgage on land, he is authorized to execute a mortgage containing such usual covenants as are demanded by those who loan money on such security.¹ But no authority to mortgage lands is conferred by a power of attorney to sell them and execute necessary deeds.² An attorney is not authorized to sell the interest in the community property of a widow, under a power from her authorizing him to dispose of all lands belonging to her husband's estate of which she was the lawful heir.³ Where an attorney is empowered to manage, control, and lease the property of a mining corporation⁴ he is not authorized to sell its property either in trust or absolutely.⁴ A power of attorney authorizing the sale and conveyance of land, and also containing general words of authority, does not confer power to convey in discharge of a debt or to settle an adverse claim.⁵

§ 364. Warranty deed under power of attorney—
Comments.—On the question whether an attorney is authorized to execute a deed with covenants of warranty, under a power of attorney, which does not expressly confer this authority upon him, the decisions are divided. Obviously, it is impossible to lay down any fixed and positive rules on the subject. It perhaps will be universally conceded that a mere naked power to convey does not authorize the execution of any deed but one conveying the legal title without covenants of warranty. But the difficulty arises where the language used in the power of attorney implies that the attorney has power to execute such conveyances as are in common use in the section of the country where the power of attorney is executed. It would seem to be a reasonable rule, that if it was the usual practice to execute deeds with clauses of warranty,

¹ *Richmond v. Voorhees*, 10 Wash. 316.

² *Campbell v. Foster*, 163 Pa. St. 609.

³ *Wynne v. Parke* (Tex. Civ. App.), 30 S. W. Rep. 52.

⁴ *Johnson v. Sage* (Idaho), 44 Pac. Rep. 641.

⁵ *Frost v. Erath Cattle Co.*, 81 Tex. 505; 26 Am. St. Rep. 831.

and by fair construction the power to execute such deeds was conferred upon the agent, he should be held to possess such power, notwithstanding that by a stricter construction this power might be held not to have been given. In each case regard must be paid to the language used, and hence it would be useless to attempt to formulate general rules. Without attempting to discuss this matter in any but a cursory manner, we call attention in the following sections to some cases in which this question arose.

§ 365. Decisions that attorney has no power to execute warranty.—Two persons appointed an attorney in their names and to their use, to grant, bargain, sell, release, convey, and confirm in fee, to any person, certain specified lots, and on such sale, to “execute, seal, and deliver, in their names, such conveyances and assurances in the law of the premises, unto the purchaser, his, her, or their heirs, or assigns forever, as should or might be needful or necessary, according to the judgment of the said attorney.” The court held that the attorney had no power to execute a deed with the usual covenants so as to bind his principals. The court took the view that a conveyance is good and operative without warranty or personal covenants, and hence, the power to insert them is not necessarily implied in an authority to convey, which must be strictly pursued, and does not warrant any varying in substance from it.¹ A similar decision was made in New Jersey. The court held that if the power authorized the attorney to sell and convey, and contained no authority to covenant, a deed executed by him must be

¹ *Nixon v. Hyseratt*, 5 Johns. 58. A person authorized his attorney among other things, “for me and in my name, to grant any and all discharges by deed or otherwise, both personal and real, as he, my said attorney, shall deem proper, and to do all other things concerning the premises as fully as I myself could do if I were personally present, hereby ratifying and confirming all the lawful acts of him, the said attorney, or his substitute, by virtue of these presents.” It was held that this power of attorney could not be construed as enabling the attorney to convey the real estate of his principal by deed of warranty: *Heath v. Nutter*, 50 Me. 378.

considered as against the grantor as a deed of bargain and sale without covenants, and would not convey after-acquired property by estoppel.¹

§ 366. Cases holding attorney has such power.— But on the other hand, the principle applied in many cases is, that if the grantor under an agreement to convey can be compelled to execute a deed with covenants, an attorney under a power to sell and convey has authority to insert the usual covenants in a deed executed by him. Thus, an agent was authorized “to contract for the sale of and to sell, either in whole or in part, the lands and real estate so purchased,” and “on such terms in all respects as he may deem most advantageous,” and “for us, and in our names, to execute to the purchaser or purchasers thereof, the assignments, contracts, or deeds of conveyance necessary for the full and perfect transfer of all of our respective right, title, and interest, dower and right of dower, as sufficiently, in all respects, as we ourselves could do personally in the premises.” The court held that these expressions, considered in conjunction with the situation of the parties and the property, the usages of the country and the acts of the parties themselves, justified the conclusion that the agent had power to execute a deed with a covenant of seisin.² Under a power of

¹ Howe v. Harrington, 18 N. J. Eq. 495. And see Ryder v. Jenny, 2 Rob. (N. Y.) 68; Van Eps v. Schenectady, 12 Johns. 436; 7 Am. Dec. 330; Mead v. Johnson, 3 Conn. 592; Dodd v. Seymour, 21 Conn. 480.

² Le Roy v. Beard, 8 How. 451. Mr. Justice Woodbury delivered the opinion of the court, and said: “It would be difficult to select language stronger than this to justify the making of covenants without specifying them *eo nomine*. When this last is done, no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument (4 Moore, 448), aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light on the question. That the language above quoted from the power of attorney is sufficient to cover the execution of such a covenant would seem naturally to be inferred, *first*, from its leaving the *terms* of the sale to be in all respects as Starr shall deem most advantageous. ‘Terms’ is an

attorney an agent was authorized to sell and convey all the real estate in a certain city owned by his principal, and also to sell and convey all the principal's interest in said property, to make, execute, and deliver all necessary

expression applicable to the conveyances and covenants to be given, as much as the amount of, and the time of paying, the consideration: *Rogers v. Kneeland*, 10 Wend. 219. To prevent misconception, this wide discretion is reiterated. The covenants or security as to the title would be likely to be among the terms agreed on, as they would influence the trade essentially, and in a new and unsettled country must be the chief reliance of the purchaser. To strengthen this view, the agent was also enabled to execute conveyances to transfer the title 'as sufficiently in all respects as we ourselves could do personally in the premises.' And it is manifest, that inserting certain covenants which would run with the land, might transfer the title in some events more perfectly than it would pass without them; and that if present 'personally' he could make such covenants, and would be likely to if requested, unless an intention existed to sell a defective title for a good one, and for the price of a good one. It is hardly to be presumed that anything so censurable as this was contemplated. Again, his authority to sell 'on such terms in all respects as he may deem most eligible,' might well be meant to extend to a term or condition to make covenants of seisin or warranty, as without such he might not be able to make an eligible sale, and obtain nearly so large a price. Now, all these expressions united in the same instrument would, *prima facie*, in common acceptance, seem designed to convey full powers to make covenants like these. And although a grant of powers is sometimes to be construed strictly (*Com. Dig. Poiar*, B. 1, and C. 6; 1 Bl. R. 283), yet it does not seem fit to fritter it away in a case like this, by very nice and metaphysical distinctions, when the general tenor of the whole instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it, by receiving a large price that otherwise would probably never have been paid: *Nind v. Marshall*, 1 Brod. & B. 319; *Rogers v. Kneeland*, 10 Wend. 219, 252. This he must refund when the title fails, or be accessary to what seems fraudulent: *Vanada v. Hopkins*, 1 Marsh. J. J. 292; 19 Am. Dec. 92. Another circumstance in support of the intent of the parties to the power of attorney to make it broad enough to cover warranties, is their position or situation as disclosed in the instrument itself: *Solly v. Forbes*, 4 Moore, 448. Le Roy resided in New York, and Starr was to act as his attorney in buying and selling lands in the 'Western States and Territories,' and this very sale was as remote as Milwaukee, in Wisconsin. For aught which appears, Le Roy, Beard, and Starr were all strangers there, and the true title to the soil little known to them, and hence they would expect to be required to give warranties when selling, and would be likely to demand them when buying. The usages of the country are believed, also, to be very uniform to insert covenants in deeds. In the case of the Lessee of *Clarke v. Courtney*, 5 Peters, 345, Justice Story says: 'This is the common course of conveyances,' and in

conveyances for this property. The power of attorney also authorized the agent "to pay all taxes on said estate, to lease said estate, and to do any and all other acts in relation to said estate that our interest may require, giving and hereby granting unto our said attorney full power and authority in and about the premises; and to use all due means, course, and process in the law, for the full, effectual, and complete execution of the business afore described; and in our name to make and execute due acquittance and discharge; . . . also to submit any matter in dispute, respecting the premises, to arbitration or otherwise, with full power to make and substitute, for the purposes aforesaid, one or more attorneys under said attorney, and the same again at pleasure to revoke, and generally to say, do, act, transact, determine, accomplish, and finish all matters and things whatsoever relating to the premises, as fully, amply, and effectually, to all intents and purposes, as we, the said constituents, if present, ought, or might personally, although the matters should require more special authority than is herein comprised; we, the said constituents ratifying, allowing, and holding firm and valid all and whatsoever our said attorney or our substitutes shall lawfully do, or cause to be done, in and about the premises, by virtue of these presents." The court held that the power in this case was broader than a mere power to sell, and that under it, he was authorized to execute a deed in the form usually adopted in conveying real estate and containing the usual covenants.¹ So it is held that where an attorney is authorized to execute a conveyance in as full and ample a manner as the principal can, he is authorized to

them 'covenants of title are usually inserted.' See, also, *Nelson v. Cowing*, 6 Hill, 338. Now, if in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine that, from usage as well as otherwise, a warranty by the agent was proper, and would be binding on the principal."

¹ *Bronson v. Coffin*, 118 Mass. 156.

execute a deed with covenants of general warranty.¹ An agent was authorized under a power of attorney to sell the land of his constituent on the best terms possible, by public or private sale, as in his judgment might be most advantageous, and to execute such contracts, agreements, conveyances, and assurances, and perform such acts as might be necessary to perfect any sales made under this power. It was held that he had power to execute a deed with covenants of warranty.²

§ 367. **Mr. Rawle's views.**—Mr. Rawle, in his treatise on Covenants for Title, discusses the topic under consideration, and says: "The question of the purchaser's right to covenants for the title from an agent acting under a power of attorney from his principal, has often arisen in cases where, in a suit against the latter, upon covenants made in his behalf by the agent, the right so to bind the principal has been denied. In an early case in New York, it was assumed that as a deed without any covenants for title was sufficient to pass the estate to the purchaser, the latter had no right to demand these covenants, and hence it was said that a power of attorney to sell and convey land, expressed in the usual form, implied no power to

¹ Taggart *v.* Stanberry, 2 McLean, 543. In this case the court refers to Nixon *v.* Hyserott, 5 Johns. 58, and says: "Between that case and the one under consideration, a distinction may be drawn; but doubts are entertained, whether that case is sustainable on principle or authority. There was not merely an authority given to convey, but to make such conveyances and assurances as might be needful or necessary, in the judgment of the attorney. Now, here was a reference to the judgment of the attorney, as to the nature of the conveyance to be executed; and a *bona fide* exercise of his judgment in this respect, should have been held to bind the principal. That such was the intention of the power, as understood by all the parties, can scarcely be doubted. If such were not the case, why was the discretion of the attorney referred to in the power? It may well be supposed that he could not have sold the land for the price received, had he agreed to execute only a general release, or deed of quitclaim."

² Peters *v.* Farnsworth, 15 Vt. 155; 40 Am. Dec. 671. And see Vanda's Heirs *v.* Hopkins' Administrators, 1 Marsh. J. J. 285; 19 Am. Dec. 92; Ward *v.* Bartholomew, 6 Pick. 410; Rucker *v.* Lowther, 6 Leigh, 259; Hedges *v.* Kerr, 4 Mon. B. 528.

covenant for the title; and in a subsequent case, the same rule was applied to the warranty of a chattel. It has, however, been held in England that an authority to sell a horse carries with it an authority to warrant him sound, as the warranty is, in general, a natural incident of the contract. This has been approved, and followed on this side of the Atlantic, and in many cases the correctness of the New York decisions has been denied, and it seems to be established by the weight of authority, that as the law recognizes the right of a purchaser to covenants for the title from the principal, it will not suffer that right to be defeated by the mere delegation by him of authority to consummate the contract. Where, however, that authority is restricted in terms so express as to control that which the law otherwise implies, the rights of the purchaser, will, of course, be limited by the letter of the instrument.”¹

§ 368. **Comments.**—The cases deciding that an attorney has power to execute a deed with covenants of warranty so as to bind his principal are based, for the most part, on the consideration that a deed of this nature is the one in common use, and that if such a deed were not given to the purchaser, the full price for the property could not be obtained; hence, the language of the power has been construed as giving the attorney power to execute such a deed, as the principal would be expected to execute if he had contracted directly with the purchaser. But, manifestly, this reasoning can have no weight, when the custom of giving warranty deeds is not universal. We should think that where this is the case the rule that powers of attorney should be construed strictly would apply, and the attorney would have no authority to perform any act not expressly warranted by his power of attorney, or resulting as a necessary implication from the language employed. In California, however, this matter has been settled by the Code, which declares: “An au-

¹ Rawle on Covenants (4th ed.), pp. 47, 48.

thority to sell and convey real property includes authority to give the usual covenants of warranty.”¹

§ 369. **Description of property to be sold.**—It is necessary that the land authorized to be sold under a power of attorney should be sufficiently described to enable it to be identified, unless it is shown *aliunde* that the land sold under the power is the only piece of land which the principal owned at the time the power of attorney was executed. Thus, an instrument giving “ample and sufficient power” to an agent “to use or dispose of any lot which I hold as may best seem to him,” confers no power to sell any particular lot.² An attorney was authorized under his power of attorney to sell “one-half” of a lot of land, but the particular half was not mentioned, nor was it provided whether he was to sell an undivided one-half, or one-half in severalty. It was held that he was authorized to sell in the exercise of his discretion any half he might select, in severalty. “The power of attorney,” said Chief Justice Sawyer, “says ‘the one-half,’ without saying the *undivided* one-half, or the west half, or the east half, or the north half, or the south half—in short, without saying which half. We think the fair and true construction is, that the particular half was left to the discretion of the agent. An estate in severalty is, certainly, ordinarily more advantageous and valuable to a party than an estate in common, and we see no good reason when the matter is thus left open, why the agent should not be regarded as vested with authority to sell in such way as

¹ Civil Code, Cal. § 2324.

² *Stafford v. Lick*, 13 Cal. 240. Said the court: “We think the paper is worthless for any purpose. A power of attorney in order to authorize the sale of real property, must contain some description of the property to be sold. The paper in question, if we admit it to contain a power to sell, designates no property whatever. ‘By this present, I give ample and sufficient power to Don Jose de Jesus Noe, to use or dispose of my lot.’ What lot? Where situated? The paper would answer as well for a lot in San Jose, Monterey, or Los Angeles, as in Yerba Buena. It is not shown that the premises in controversy is the only lot which was owned by Fernandez at the time, and we are not to presume, in the absence of proof, that such was the case.”

to render the transaction most advantageous to both parties. He was authorized to sell *one-half* of the lot, and he sold *one-half* and *no more*. He was not in terms limited to any particular half, or to an undivided half of the whole. He would be much more likely to find a purchaser for, and the principal would be much more likely to desire to sell, the whole interest in one-half of the lot, than an undivided half of the whole; and business men generally would, at the first blush, be likely to understand from the terms of the power that the sale of the entire half of the whole lot was contemplated by the party making the power. Such a sale would ordinarily be most advantageous and most desirable to both seller and buyer. We do not think the agent exceeded his power."¹ A power of attorney authorizing the attorney to sell and convey all land which his principal had not previously *conveyed*, has been held to authorize the attorney to convey such land as the principal had prior to the execution of the power of attorney *sold* but not conveyed.² A power of attorney, by which the attorney is authorized to sell all the land of his principal situated in a designated locality, is perfectly valid. In such a case it is not essential that the property owned by the principal should be particularly described.³ A party who is in possession of public land describes the same with sufficient certainty in a power of attorney by designating it his claim of land.⁴

§ 370. **Power to sell imports a sale for cash.**—Unless there is some language in the power of attorney justifying the inference that other than cash sales were contemplated by the parties, a power to sell imports that the sale is to be for cash. But when A authorizes B to sell land, and pay therewith the indebtedness of A to C, and B sells the land to C for the amount of a note held by C against A, which was all the land was worth in the market, and

¹ *Aleman v. Daly*, 36 Cal. 90, 93.

² *Mitchell v. Maupin*, 3 Mon. 185.

³ *Roper v. McFadden*, 48 Cal. 346.

⁴ *Henley v. Hotaling*, 41 Cal. 22.

took the note in payment, this is a sale for cash within the rule we have just stated, and cannot be regarded as an accord and satisfaction.¹ Where the power is to sell for one-half cash, and the other half "payable on or before one year," a sale for one-half cash and the other half "payable in one year," is within the power, for in either event the principal could not demand payment before the expiration of one year.²

§ 371. Sale on credit must be on reasonable credit.—Where an attorney in fact is authorized to sell land on credit without specifying the time of such credit, he has power only to sell upon a reasonable credit. The question in any given case of whether the credit that the attorney has given is reasonable or not, is one of fact, to be decided by the evidence. It will not be presumed that the principal intended to enter into an absurd contract, and that he intended to give the attorney unbounded discretion to sell on a credit unusual in the sale of real estate in the vicinity where it is situated.³

§ 372. Power to sell does not authorize gift.—A power to sell is special. In order that a deed purporting to be executed under a power of attorney may be valid, it must be executed in pursuance of the power, and be within its terms. If this is not the case, the deed as a transfer of

¹ *McNeil v. Shirley*, 33 Cal. 202. See *Kenny v. Hazeltine*, 6 Humph. 62. And see *Silverman v. Bullock*, 98 Ill. 11, where notes and mortgages were taken by the attorney and transferred to an innocent holder, and the court held that he could enforce the security. A power to sell implies a sale for cash: *Dyer v. Duffy*, 39 W. Va. 148. An attorney cannot convey in satisfaction of a pre-existing moral obligation, where he is authorized to sell and convey for money or such other consideration as may seem to the advantage of the grantor, and to receive the consideration: *Smith v. Powell*, 5 Tex. Civ. App. 373. Where an attorney is authorized to sell "at any price he may see proper to accept, and upon such terms as he may see proper to do," he is not authorized to make a sale to satisfy a judgment to which his principals were not parties: *Folts v. Ferguson* (Tex. Civ. App.), 24 S. W. Rep. 657.

² *Deakin v. Underwood*, 37 Minn. 98; 5 Am. St. Rep. 827.

³ *Brown v. Central Land Co.*, 42 Cal. 257; *Delano v. Jacoby*, 96 Cal. 275.

the constituent's title is inoperative. Hence, a power to sell does not authorize a gift of the property, or the transfer of it for any purpose other than in completion of a sale.¹ A authorized B by a power of attorney to sell and convey certain property. B executed a deed to C, which on its face expressed a valuable consideration, but which in truth was not made in pursuance of any sale or for any real consideration. The only object the parties had in executing the deed was to enable C to control the property and protect it from trespassers. It was held that the grantee took no title under this deed because it was not executed in pursuance of the power. As between the attorney and grantee, it was without effect.²

§ 372 a. **Agent cannot sell to pay his own debts.**—If an agent has power to sell and convey, a deed made pursuant to the power, showing upon its face a compliance with all the requirements of the power of the attorney, will convey the legal title to the grantee. The title will remain in him until a court of equity sets aside the conveyance, although the agent may have violated his duty to the grantor by fraudulent acts not appearing on the face of the deed. But if the act of the agent is in excess of his authority, and such want of authority is apparent upon the face of the record, the deed executed by the agent is void, and its character as such may be determined in whatever court or proceeding it may be proffered as a foundation of title. Where the power of the agent is to sell and convey, the agent cannot, as against the principal, convey it in trust for the payment of his own debts to one who has notice.³ Where an agent is authorized to sell and convey land in an entire tract, or in separate parcels, as he should consider best for his

¹ Dupont v. Wertheman, 10 Cal. 354; Mott v. Smith, 16 Cal. 533. Where an attorney is authorized to convey land, and is directed to pay the proceeds to a creditor of the grantor, he may convey the land directly to the creditor in satisfaction of the debt: Bertschy v. Bank of Sheboygan, 89 Wis. 473.

² Dupont v. Wertheman, *supra*.

³ Frink v. Roe, 70 Cal. 296.

principal, and he conveys real estate of the value of three or four thousand dollars to his own daughter, for the nominal consideration of one dollar, the deed may be treated by the principal as a mere nullity. The agent under such a power is authorized to convey for a valuable consideration only, and not for a mere nominal sum.¹ An attorney does not obtain title to land by an irrevocable power to sell and convey, together with a release to the attorney of the grantor's claim to the proceeds arising from any sales made by the attorney.²

¹ *Meade v. Brothers*, 28 Wis. 689. The court, per Mr. Justice Cole, said: "Evidently, this contemplated a sale of the property for a valuable consideration, and it never could have been intended to authorize the agent to sell and transfer the title for a mere nominal consideration. The letter of attorney, it is true, gave the agent some discretion as to the amount of money which the entire property or any portion thereof should be sold for; but the agent was expressly required to exercise that discretion for the best interest of his principal. Manifestly, it never was intended that he should give away the property; and the instrument under which he assumed to act conferred no authority upon him to make such a disposition of it. And in conveying it away for a mere nominal consideration, he acted entirely without the scope of the authority committed to him. It is a cardinal rule that if the act of the agent varies substantially from the authority or commission, in its nature, or extent or degree, it is void as to the principal, and does not bind him: *Story on Agency*, § 165. What act could an agent possibly do more substantially and grossly in violation of the authority delegated to him than to give away his principal's property, which it was intended he should only convey upon being paid a valuable consideration? And the grantee in the deed must have known from the very terms of the letter of attorney that Lowe was acting beyond the scope of his authority and committing a gross fraud upon his principal. The deed, therefore, not being executed in pursuance of the power conferred upon the agent, conveyed no title, and in fact was void as to the plaintiff. It presented no obstacle to plaintiff's recovery: *Dupont v. Wertheman*, 10 Cal. 954; *Mott v. Smith*, 16 Cal. 534; *Delafield v. Illinois*, 26 Wend. 192; *Cowan v. Adams*, 10 Me. 374; *St. John v. Redmond*, 9 Porter (Ala.), 428; *Reese v. Medlach*, 27 Tex. 120."

The court held that the attorney had no power to convey the real estate except upon a valuable consideration paid therefor by the purchaser, and his attempt to do so was nugatory, and distinguished this case from *Eaton v. Smith*, 19 Wis. 537, where it was held that the legal title passed, and the effect of notice to the grantee was only to make the deed voidable.

² *Douglas v. De Laitre*, 55 Fed. Rep. 873.

§ 373. **Exchange not authorized by power to sell.**—On the same principle that an attorney's power to sell is special and limited, he cannot, under such power, exchange the property of his principal for other property. In one case, the power conferred upon an agent was "to bargain, sell, alien, enfeoff, transfer, and convey, by deed in fee simple," a certain lot of land, and "to do and perform any and all acts and deeds necessary to be done in and about the premises." The attorney exchanged the lot for a stock of merchandize. The court held that under this power of attorney the agent could sell only for money, and, having failed to do so, the deed made by him was void. "The agency was clearly special," said the court, "it was confined to selling and conveying the lot. There were no directions or instructions beyond the selling and conveying, and the doing of such things as might be necessary to carry out the power. Under this power the agent had no right to sell and convey for any other consideration than for money."¹ And not only is this the proper construction to be placed upon the language itself authorizing a sale, but evidence is inadmissible to show that it is the practice of land agents, under a power to sell, to exchange the land of their principals for other property. Evidence of this character could have no other effect than to contravene the legal signification of the power of attorney.² An attorney in fact

¹ Lumpkin v. Wilson, 5 Heisk. 555.

² Reese v. Medlock, 27 Tex. 120; 84 Am. Dec. 611. Said the court: "It is a well-settled general principle that when an agency is created and conferred by a written instrument, the nature and extent of the authority given must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, for that would be to contradict or vary the terms of the written instrument. There may, however, be some qualifications and limitations properly belonging to this rule, whereby, especially in cases of general or implied agencies, the usages of a particular trade or business, or of a particular class of persons, are properly admissible, not, indeed, for the purpose of enlarging the powers of the agents employed therein, but for the means of interpreting and rightly understanding those powers which are actually given. The power of attorney under which the agent sold the land in controversy to the

sold land, and under an agreement made with a third person, at the time at which the deed was executed, by which such third person was to advance the money to enable the grantees to pay for the land, the attorney took notes and a mortgage from the grantees, and assigned them to such third person. The latter delivered the money necessary to pay for the land to a land agent, who immediately paid it to the attorney. The transaction was held to be a sale for cash, as provided for by the terms of the power of attorney, and not a barter nor a sale on credit.¹

§ 374. Discretion of attorney whether land is to be used for specified purposes.—Where a power of attorney authorizes the agent to sell land for specified purposes, the attorney is vested with discretion of judging whether a purchaser intends to use the land for such purposes or not, and his deed is valid, notwithstanding the land may not be used for such purposes, if there was no fraud on the part of the attorney or the purchaser. Thus, an attorney was authorized to sell certain lands “for the purpose of making actual settlement thereon,” and was authorized to convey such land in fee simple, and to execute “legal and sufficient deeds, with the several covenants and a general warranty.” It was held that the attorney

defendant Medlock did not authorize him to barter or exchange it for other property. It cannot surely be seriously insisted that there has become such a general and uniform custom or usage of trade by agents for sale of land in this State, in contravention to the legal import of the instrument under which they derive their authority, as to overturn and abrogate the well-established rules of legal construction, by which the courts would otherwise be governed. If, however, such was the fact, the testimony offered by the defendant falls far short of justifying the application in this case of such an exception to the general rule, to which reference has been made, and the court did not err in excluding it from the jury.” A power to sell does not authorize the execution of a mortgage: *Bloomer v. Waldron*, 3 Hill, 361; *Jeffrey v. Hursh*, 49 Mich. 31. But a power of attorney to sell or lease property, or “to borrow money and pledge the property by way of mortgage,” authorizes the borrowing of money on the property by conveying it in fee to the lender, and taking back a redeemable lease at a rent equivalent to the interest on the sum borrowed: *Posner v. Bayless*, 59 Md. 56.

¹ *Plummer v. Buck*, 16 Neb. 322.

had the power of determining whether the purchaser intended to use the lands for the purpose of settlement, and that the efficacy of the deed would not be affected by the fact that it afterward appeared that the land was not purchased for the purposes of actual settlement, but for purely speculative ends.¹ Judge Tenney, who delivered the opinion of the court, said that if the owner had desired to make all conveyances himself without the intervention of an agent, his unconditional deeds made to such as satisfied him that they took the land for actual settlement, would pass the title, and it would be immaterial if it should afterward appear that he had been deceived. In other words, as he had undertaken to judge of the evidence of their purpose, he would be concluded by the judgment he had formed. The learned justice then proceeded to say: "When he delegated the power to make conveyances to an attorney, with the restriction contained in the instrument, in which he engages to ratify and confirm his legal acts, is it to be supposed that he did not mean to intrust to his judgment and discretion, the evidence of the intention of those who proposed to be purchasers, and that he should exercise them in the same manner that the constituent would have exercised his own judgment and discretion, if he had acted in the premises? The intention of the purchasers, in order to have effect, must have been judged of and determined by some one. No provision having been made for another mode in which the purpose of the purchasers could be ascertained, previous to the conveyances, the power to perform that duty must have been intended to be conferred upon the attorney."² So in a case in California, the attorney was authorized to sell and convey lots in a town "for purposes of actual improvement, for mercantile and other purposes." These words were held not to be a limitation upon his general power to sell.³

¹ *Spofford v. Hobbs*, 29 Me. 148; 48 Am. Dec. 521.

² *Spofford v. Hobbs*, *supra*.

³ *Spect v. Gregg*, 51 Cal. 198.

§ 374 a. Power of attorney to lay out ways.—If an attorney has power to sell any or all the land of the principal without restriction as to the manner of sale, he has the implied authority to plat the land and lay out lots and ways. The platting of land is a common step toward its sale, and where the land is subdivided and sold in parcels, the laying out of streets is frequently necessary, and is incidental to the exercise of the full authority to sell. Such a power is distinct from the attempt to dedicate another's land to the public.¹ Deeds executed by the attorney, under these circumstances, will pass the title to the platted streets by which the lots conveyed are bounded.²

§ 375. Revocation.—A principal has power to revoke the authority of the attorney at any time, unless the power is coupled with an interest, or has been conferred upon the attorney for a valuable consideration.³ A principal employed a firm of brokers to secure a purchaser for his lands. He promised that he would pay them a certain sum, if they should find, within a month from the time of the creation of the agency, a person willing and able to purchase the property at a specified price. The brokers succeeded in finding a purchaser before the expiration of the month, but the principal had previously to this revoked their agency. It was held that the principal had power to revoke their authority at any time, and hence they were not entitled to commissions.⁴ When a power

¹ *Anthony v. City of Providence*, 18 R. I. 699.

² *Anthony v. City of Providence*, *supra*.

³ *Hartley's Appeal*, 53 Pa. St. 212; 91 Am. Dec. 207; *Brown v. Pforr*, 38 Cal. 550; *Barr v. Schroeder*, 32 Cal. 609. The death of the principal before the delivery of a deed previously executed by an attorney in fact renders the deed inoperative: *Kent v. Cecil* (Tex. Civ. App.), 25 S. W. Rep. 715.

⁴ *Brown v. Pforr*, 38 Cal. 550. Mr. Justice Sanderson, in delivering the opinion of the court, said: "It is a general rule that an agency, whether to sell land or do any other act, unless coupled with an interest, or given for a valuable consideration, is revocable at any time. This general principle is not disputed by counsel for the plaintiffs, but it is insisted that this case is taken without its operation by the peculiar

of attorney has been recorded, the revocation of the power should also be recorded.¹ Of course the rules applicable to all classes of agency, that the death of the principal, or his insanity, operates as a revocation of the agency, apply with equal force to powers of attorney.² A deed made after the death of the principal is void, although the attorney may have no knowledge of the death.³

§ 376. Effect of sale by principal upon attorney's commissions.—The principal may sell the land and convey a

terms of the contract, by which, as is claimed, the defendant has impliedly, if not expressly, restricted his power of revocation, and made the contract continuous for a month. This seems to have been the construction put upon the contract by the court below, but we do not so understand it. Its terms, as stated in the complaint, are that the defendant employed the plaintiffs to find a purchaser for the real estate described in the complaint, 'and promised and agreed to and with the plaintiffs, in consideration that the plaintiffs would undertake to seek, and should, within a month from that date, succeed in finding a person who would be willing and able, and who would agree to purchase the said property at and for the sum of sixty-five thousand dollars in gold coin, he would pay them for such service the sum of seven hundred and fifty dollars in gold coin.' Counsel find the alleged restriction upon the defendant's power of revocation in the words by which the time within which the plaintiffs are required to perform is limited to one month from the date of the contract; but, as it seems to us, the restriction is upon the power of plaintiffs, and not upon that of the defendant. It seems obvious to us that the restriction was intended for the benefit of the defendant, and not the plaintiffs. The force of the limitation is, that the defendant will pay them the stipulated price for the service if they completely perform it within one month; otherwise he will pay them nothing. There is nothing directly or impliedly affecting the question of revocation; and, indeed, we are unable to perceive how, under any circumstances, a mere limit as to the time allowed for the performance of a contract of agency to sell land, can be construed into an agreement on the part of the principal not to revoke the power. The rule that in this class of contracts the principal may revoke at any time before *complete* performance by the broker, unless he has expressly otherwise agreed, may be a harsh rule, as suggested by counsel; but if it is, it would seem to be a very easy matter for the broker to protect himself against it. At all events, if he does not insert a covenant to that effect in his contract, the courts cannot do it for him." And see *Neilson v. Lee*, 60 Cal. 555.

¹ *Weile v. United States*, 7 Ct. of Cl. 535.

² *Doe ex dem. Smith v. Smith*, 1 Jones (N. J.), 135; 59 Am. Dec. 581; *Jenkins v. Atkins*, 1 Humph. 294; 34 Am. Dec. 648.

³ *Ferris v. Irving*, 28 Cal. 645.

good title if he does so before the attorney acts under the power. He does not, by a mere execution of a power of attorney to another, deprive himself of the right to sell. But if an owner of land give a power of attorney to a person to sell the land for a certain sum within a specified time, and agrees to give the attorney a certain percentage of the amount for which the land is to be sold, as commission for effecting a sale, the attorney is entitled to his commissions if he effects a sale within the time specified, and although the principal has a right also to sell, he cannot by a sale defeat the attorney's claim to his commissions.¹

§ 377. **Execution of deeds by attorneys in fact.**—In the early cases the execution of deeds by attorneys was viewed with much, and perhaps unnecessary strictness. It was asserted as a broad and general rule that in order to bind the principal the deed must purport to be made by the principal in his name, and his name should be signed to the deed. Hence, if an agent executed a conveyance in his own name, the title of his principal was not thereby conveyed. The same result would follow if the agent should declare that he was an agent, but purported to execute the deed as his own act, and not that of the principal.² "If an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney; otherwise the conveyance is void. And it

¹ *Blood v. Shannon*, 29 Cal. 393.

² See, generally, *Combe's case*, 9 Coke, 75; *Clarke v. Courtney*, 5 Peters, 319; 2 Kent's Com. 631; *Fowler v. Shearer*, 7 Mass. 14; *Stone v. Wood*, 7 Cowen, 453; 17 Am. Dec. 529; *Spencer v. Field*, 10 Wend. 88; *Appleton v. Binks*, 5 East, 148; *Stinchfield v. Little*, 1 Greenl. 231; 10 Am. Dec. 65; *Townsend v. Hubbard*, 4 Hill, 351; *Elwell v. Shaw*, 16 Mass. 42; 8 Am. Dec. 126; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Bogart v. De Bussey*; 6 Johns. 94; *Tippetts v. Walker*, 4 Mass. 595; *Locke v. Alexander*, 2 Hawks, 155; 11 Am. Dec. 750; *Martin v. Flowers*, 8 Leigh, 158; *Fetter v. Field*, 1 La. An. 80; *Appleton v. Binks*, 5 East, 148; *Sheldon v. Dunlap*, 1 Har. (N. J.) 245; *Lutz v. Linthicum*, 8 Peters, 165; *Story on Agency*, § 148; *Brinley v. Mann*, 2 Cush. 337; 48 Am. Dec. 669; *Hackney v. Butts*, 41 Ark. 393.

is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name.”¹

§ 378. **Relaxation of this strictness.**—Even at a very early day, courts endeavored to free themselves from the strict rules of the common law relative to the execution of deeds by attorneys in fact, in order that by so doing they might effectuate the intention of the parties. Thus, in an early case in Massachusetts, a deed, after reciting the power of attorney, proceeded: “Now, know ye that I, the said Joshua, by virtue of the power aforesaid, in consideration of two hundred dollars paid me by J. S. and T. P. S., of, etc., the receipt whereof I do hereby acknowledge, do hereby bargain, grant, sell, and convey unto the said J. S. and T. P. S. a certain tract of land,” etc., “to have and to hold to them, the said J. S. and T. P. S., their heirs and assigns forever; and I do covenant with the said J. S. and T. P. S. that I am duly empowered to make the grant and conveyance aforesaid; that the said Jonathan [the principal], at the time of executing said power, was, and now is, lawfully seised of the premises, and that he will warrant and defend the same to the said J. S. and T. P. S. forever, against the lawful claims and demands

¹ Chief Justice Parsons, in *Fowler v. Shearer*, 7 Mass. 14, 19; *Welsh v. Usher*, 2 Hill Ch. 167; 29 Am. Dec. 63. By the production of a power of attorney authorizing a sale and conveyance, and of a deed in the usual form reciting a consideration, a *prima facie* case is made sufficient in the absence of evidence to overcome it to support a verdict in favor of the grantee as against the grantor's heirs: *Mowry v. Mowry*, 103 Cal. 314. Where a letter of attorney had been given by certain judgment creditors authorizing the release of their liens on the lands of the debtor whenever he desired to sell, it being provided that the proceeds should be applied on a mortgage debt which was prior to their liens, and where a part of the land had been sold and the price paid applied on the mortgage debt, the attorney agreeing to release the land from the liens, it was held that the judgment creditors could not have the land subjected to their liens on the ground that no release had actually been executed, and that the letter did not authorize the attorney's parol agreement to release: *Young v. Coray*, 167 Pa. St. 617.

of all persons. In testimony whereof I have hereunto set the name and seal of the said Jonathan, this," etc. The deed, however, was signed only by the attorney. Mr. Justice Wilde said: "We have examined the cases cited in the argument of this cause, with a strong wish to discover some ground which would authorize a decision according to the apparent equity of the case. The objection made to the grant to the tenant is merely technical; and it is impossible that anyone should doubt as to the intention of the parties. Nevertheless, the objection is supported by all the adjudged cases relating to the point. It does not appear that the authority of Coombe's case is at all shaken by more modern decisions. All concur in laying it down as an indispensable requisite, to give validity to a deed executed by an attorney, that it should be made in the name of the principal."¹ In California the Civil Code declares: "An instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him if such intent is plainly inferable from the instrument itself."² But a deed executed by an agent in his own name is a nullity as to the principal.³ Mr. Parsons, speaking of this subject, says: "The manner in which an agent should sign an instrument for his principal has given rise to some controversy. There has been a tendency to discriminate in this respect; to say, for instance, that, if A signs 'A for B,' this is the signature of A, and he is the contracting party, although he makes the contract at the instance and for the benefit of B. But, if he signs 'B by A,' then it is the contract of B, made by him through his instrument, A. In the first case, A is the principal; in the second, B is the prin-

¹ *Elwell v. Shaw*, 16 Mass. 42, 46; 8 Am. Dec. 126. And see *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176, where it is held, that whether a deed has been executed in the name of the principal, must be determined by the construction of the whole instrument, and not from the signature alone, or from any particular clause. .

² Civil Code Cal., § 2337.

³ *Fisher v. Salmon*, 1 Cal. 413; 54 Am. Dec. 297. In Texas, a deed may be made in the name of the attorney without referring to the principal: *Trinity County Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 671.

cipal, and A his agent. But the recent cases and the best reasons are for determining in each instance, and with whatever technical inaccuracy the signature is made, from the facts and the evidence, that a party is an agent or a principal, in accordance with the intention of the parties to the contract, if the words are sufficient to bear the construction.”¹

§ 379. **Proper mode of signature.**—The most advisable mode for the agent to adopt is to sign the principal's name, adding his own as agent. Thus, the deed of A, when made by an attorney, should properly be signed “A by B, his attorney in fact,” although this strictness is to a great extent dispensed with by the tendency of modern decisions. Some controversy has arisen over the question whether a signature of the principal's name by the agent without adding his own, and out of the principal's presence, is a proper signature. This is not the case of a deed signed by the grantor's direction in his presence which we have previously discussed. Upon the particular question to which we now advert, there is a division of opinion. It is held on one hand that it is not a valid execution of a deed for an attorney to sign the name of his principal without adding his own as such to a deed containing nothing to indicate that it was executed by attorney.²

¹ 1 Parsons on Contracts, 54. And see *Shanks v. Lancaster*, 5 Gratt. 110; 50 Am. Dec. 108. Where an attorney in fact executes an agreement conveying the interest of heirs in an estate without naming the heirs, they will not be bound: *McMaster v. Childress* (Tex. Civ. App.), 30 S. W. Rep. 843.

² *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771. *Fletcher, J.*, delivered the opinion of the court, and said: “When one writes the name of another to a deed in his presence, at his request and by his direction, the act of writing is regarded as the party's personal act, as much as if he had held the pen and signed and sealed the instrument with his own hand: *Story on Agency*, 51; *Ball v. Dunsterville*, 4 Term Rep. 313; *Lovelace's case*, *Jones W.* 268; *Hibblewhite v. M'Morine*, 6 Mees. & W. 200, 214, 215; *Gardner v. Gardner*, 5 Cush. 483; 52 Am. Dec. 740. In the present instance, the deed and note were not executed by Benjamin personally, nor in his presence, but in his absence and so far as appears, without his knowledge. But upon the face of the papers they appear to have been signed by him personally and with his own

But on the other hand, it is held that a deed is well executed to which the attorney signs the principal's name only. "It would be useless to add the name and seal of

hand. In fact, they were signed by Levi; but it does not appear upon the face of the papers that in signing the name of Benjamin, Levi acted as his agent, or intended to act under the power of attorney from Benjamin, or meant to execute the authority given by that power. The deed and note which thus appear to be signed by Benjamin personally, when, in fact, they were signed by Levi, are not such instruments as Levi was authorized to make. He was authorized to make instruments in the name of Benjamin; not as made by Benjamin, personally, but by Levi, in his name, as his attorney. It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear by the instruments themselves which he executes that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is that the attorney shall execute the deed as attorney, but in the name of the principal. There is much learning and discussion in the books of the law as to the proper mode of executing authority by agents. In what form the agent should execute his authority so as to bind his principal and not bind himself, has been a subject largely considered in elementary works, and much discussed in numerous adjudged cases. The rule commonly laid down by all the authorities, is that to bind the principal, the instrument must purport on its face to be the instrument of the principal, and executed in his name; or at least, that the tenor of the instrument should clearly show that the principal is intended to be bound thereby, and that the agent acts merely as his agent in executing it. But it is contended that it is nowhere laid down in any work of authority, or established by any adjudged case, that the agent may put the name of the principal as his own personal act and signature, the execution of the agent as agent not being in any way disclosed. Such an execution does not appear to be warranted by the power delegated to execute the instrument as attorney, but in the name of the principal. If such a mode of execution is proper and legal, it seems most remarkable that it is nowhere stated or suggested in any work of authority. The execution of instruments by agents in this way would certainly be attended with great difficulties and dangers. If the agent might execute instruments in this mode, the principal, if he found his

the attorney, for it is what it purports to be, the deed of the principal and not the attorney, and therefore does not require his name or seal, but the name and seal of the principal only.”¹

§ 380. **Comments.**—It is obvious that as a method of preserving evidence, it is advisable that in all cases the attorney should add his own name after writing that of his principal, in order that the instrument may show upon its face that it was executed by an attorney, and who such attorney was. Nevertheless, if an attorney has precedent power to execute a deed in the name of his principal, it cannot be said that it is indispensable to the

name signed to an instrument, would have no means of knowing by whom it had been signed, or whether he was bound or was not bound by such signature; and other persons might be greatly deceived and defrauded by relying upon such signature as the personal act and signature of the principal, when the event might prove that it was put there by an agent, who had mistaken his authority, and consequently that the principal was not bound. When it should be discovered that the name of the principal was not written by him, as it purports to be, it might be wholly impossible to prove the execution by attorney, as there would be nothing on the note to indicate such an execution. For authorities as to the form of execution of the mortgage and note, see Story on Agency, §§ 147, 148, 153, notes, and cases cited; Hoffman’s Opinion, 3 Am. Jur. 71–85; Wilks v. Back, 2 East, 142; Story on Notes, 11, 66, 71.” The court said, however, that it was not necessary to place its decision on this ground.

¹ Devinney v. Reynolds, 1 Watts & S. 328, 332, per Rogers, J. In Forsyth v. Day, 41 Me. 382, 391, in which case a note was signed by an agent writing the principal’s name without his own, Rice, J., said: “No case, I apprehend, can be found in the books which will sustain the rule so broadly laid down by the learned judge in the case of Wood v. Goodrich, cited above. Nor can the doctrine be sustained on principle. It is difficult to perceive any sound reason why, if one man may authorize another to act for him and bind him, he may not authorize him thus to act for and bind him in one name as well as in another. As matter of convenience in preserving testimony, it may be well that the names of all parties who are in any way connected with a written instrument, should appear upon the instruments themselves. But the fact that the name of the agent by whom the signature of the principal is affixed to an instrument, appears upon the instrument itself, neither proves nor has any tendency to prove the authority of such agent. That must be established *aliunde*, whether his name appears as agent, or whether he simply places the name of his principal to the instrument to be recorded.”

valid execution of his power, that he should add his own name to the instrument which he executes for his principal. The principal authorizes him to act in the former's name instead, and he may, so far as his authority extends, be considered for all practical purposes as the principal himself. A person has power to sign the principal's name without written authority, if done at his request and in his presence. He can act for his principal in his absence only by virtue of written authority, but in either case he does all that is requisite by signing his principal's name and acting in his stead.

§ 381. **Some illustrations.**—Without desiring to enter into an exhaustive examination and discussion of the various cases that have come before the courts, in which the form and manner in which the power of the attorney in executing a deed for his principal should be exercised have been considered, we call the attention of the reader to a few of the cases in which the principles stated in the foregoing sections have been applied. Where articles of agreement for the sale of land were executed on one part by B, as the attorney of A, and were signed, "in witness whereof the said B, as attorney of the parties of the first part, and the said parties of the second part, have hereunto set their hands and seals," it was held that the agreement was not executed by the principal.¹ The language of a deed was, "I, the said Carey L. Clarke, attorney as aforesaid, do," etc., and was signed, "in witness whereof the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal," and was signed by the attorney in his own name. This was held not to be the deed of the principal. "This may savor of refine-

¹ *Townsend v. Hubbard*, 4 Hill, 351. Where an attorney is authorized to sell the land belonging to a named estate of which the donor, with others, is the heir, and he executes a deed in which he describes himself as the attorney for the heirs of the decedent, signing it in the same form, the deed, in equity, will convey whatever interest the donor of the power had in the land as heir: *Wynne v. Parke* (Tex. Civ. App.), 30 S. W. Rep. 52.

ment," said Mr. Justice Story, in delivering the opinion of the court, "since it is apparent that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact, whether that intent has been executed in such a manner as to possess a legal validity."¹ Where a deed purporting to be made by A, attorney in fact for B, proceeded, "that the said attorney in fact, A, doth release and quitclaim," and concluded, "in testimony whereof the said B hath hereunto set his hand and seal," but was signed by the attorney alone, who did not add his designation as attorney, it was held not to be the deed of the principal.² So in California, it was held that neither under the Mexican nor the common law would a deed made by an attorney in fact, naming himself as attorney for his principal as the party of the first part, and signing his own name as the attorney in fact of his principal, convey the title of the latter.³ So a deed purporting to be made by "Stephen Smith," but signed "Stephen Henry Smith, attorney in fact of

¹ Lessee of Clark v. Courtney, 5 Peters, 318, 349, and cases cited.

² Martin v. Flowers, 8 Leigh, 158. Cabell, J., in delivering the opinion of the court, said: "The legal title to land cannot pass from him who has it, but by his deed. Such deed may be executed by his attorney duly authorized for the purpose. But it must be so executed as to be the deed of his principal. It is not sufficient, therefore, that it shall be executed by the person who was authorized to make it; but it must be done by him as attorney. For this purpose it is necessary that the attorney shall either sign the name of the principal, with a seal annexed, stating it to be done by him as attorney for the principal; or he may sign his own name, with a seal annexed, stating it to be for the principal. In either of these forms, the deed becomes the deed of the principal; and if everything else be correct, it conveys the title of the principal. But if the deed be signed and sealed by the attorney, neither in the name of the principal nor in his own name, as attorney for the principal, it is not the deed of the principal. This was decided as early as the sixth year of Queen Elizabeth (Moore's Rep. 70), and has been uniformly recognized ever since: Combe's case, 9 Code Rep. 75; 4 Bacon's Abr., tit. Leases, I, pl. 10, p. 140; Fronton v. Small, 2 Raym. Ld. 1418; White v. Cuyler, 6 Term Rep. 176. Similar decisions have been made in the courts of Massachusetts and New York, and also in the Supreme Court of the United States. I would refer particularly to the case of Lessee of Clarke et al. v. Courtney et al., 5 Peters, 349."

³ Echols v. Cheney, 28 Cal. 157.

Stephen Smith," was held not to be the deed of the ostensible grantor.¹ If the attorney has power to execute a deed for his principal, and the deed which he executes or attempts to execute is defective for want of a formal execution in the name of the principal, occasioned by accident or mistake, it is binding in equity, and will be enforced against subsequent purchasers with notice.²

§ 381 a. Conveying individual interest where power is given by several.—Where a power of attorney is executed by two or more persons, can it be executed so as to convey the interest of one either in the same land or other land? This question is a very important one, because it frequently happens that land may be held in common by several, and each one of the cotenants may own other land in his individual right. While this question does not seem to have come frequently before the courts for decision, we believe the correct rule to be that under such circumstances the attorney has no power to convey the interest of one tenant in the land, or to convey land in which one of the principals is solely interested.³

¹ *Morrison v. Bowman*, 29 Cal. 337. In *Thurman v. Cameron*, 24 Wend. 87, Judge Cowen says: "The attorney is bound to use the name of his principal, both in the body of the deed and by way of signature, and for and in the name of his principal to affix the proper seal. If he make the deed in his own name, it is his own personal contract, and cannot operate as against his principal for any purpose." And see *Jones v. Carter*, 4 Hen. & M. 196; *Barger v. Miller*, 4 Wash. C. C. 280; *Townsend v. Corning*, 23 Wend. 438; *Harper v. Hampton*, 1 Har. & J. 709.

² *Love v. Sierra N. L. W. & M. Co.*, 32 Cal. 639; 91 Am. Dec. 602. "We consider it as settled," said the court, "that an agreement under seal made by an attorney for his principal, though inoperative at law for want of a formal execution in the name of the principal, is binding in equity if the attorney had authority; and if the instrument so defectively executed be a conveyance of real estate, it will be sustained in equity as an agreement to convey, and will be good against the principal, subsequent lien creditors, and subsequent purchasers with notice." And see, also, *Beatty v. Clark*, 20 Cal. 12; *Bodley v. Ferguson*, 30 Cal. 511; *Daggett v. Rankin*, 31 Cal. 322; *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731; *Wilkinson v. Getty*, 13 Iowa, 157; 81 Am. Dec. 428; *Yerby v. Grigsby*, 9 Leigh, 387.

³ *Dodge v. Hopkins*, 14 Wis. 686; *Davenport v. Parsons*, 10 Mich. 42; 81 Am. Dec. 772; *Gilbert v. How*, 45 Minn. 121; 22 Am. St. Rep. 724.

Speaking of a power of attorney in this form, Mr. Justice Collins said: "By its terms the attorney was not empowered to convey land held and owned as the undivided property of one, and in which the other had no interest, nor was he given authority to transact any business except that in which the parties were jointly concerned. The power was special and the written power joint in form."¹ A deed made in the name of both principals is void, unless both had an interest in the land conveyed.² It was decided, however, by the Supreme Court of the United States, that a power of attorney in general terms given by a husband and his wife, containing no clause restraining the attorney from selling the interest of either separately, would authorize the attorney to execute a deed conveying the interest of the husband alone.³ But an

In *Dodge v. Hopkins*, *supra*, the authority conferred by husband and wife on the agent was: "To sell all *our* right and title in any and all the lots of which *we* may be possessed in the City of M., and particularly those lots which were conveyed to *us* by J. D. D. and S. T. M., for the number and description of which we refer to the records of deeds in the county of D.; and in *our* name to execute all deeds necessary to convey *our* title to said lots," etc. The court stated the rule of law to be well settled that the authority of a special agent must be strictly pursued, and, if it is not, the principal will not be bound, and said: "It seems to us too obvious for argument that upon the face of the instrument the agent had no power to sell the plaintiff's separate estate. We are to dispose of the question as if the plaintiff were here resisting, instead of endeavoring to avail himself of the authority exercised. If the position of the parties were reversed, the plaintiff repudiating the contract as unauthorized, and the defendant seeking a specific performance, it would hardly be seriously contended that the letter of attorney alone would bind him. Reference was made to the records in the office of the register. An examination of the conveyances referred to might reveal the fact that the title of the lots was vested solely in the plaintiff, and that there was no joint estate to which the letter of attorney could be applied which would place matters in a very different attitude. It might then be very reasonably urged that Mrs. Dodge joined in the letter of attorney for the purpose of releasing her right of dower in the estate of her husband. Unaided by extrinsic evidence we cannot assume that there was no joint estate to which the authority could be applied, or depart from the strict language of the instrument."

¹ *Gilbert v. How*, 45 Minn. 121; 22 Am. St. Rep. 724.

² *Gilbert v. How*, *supra*.

³ *Holladay v. Daily*, 19 Wall. 606.

examination of that case will show, notwithstanding some language in the course of the opinion, that it is not opposed to the rule stated. The court admits the rule that a special power of attorney must be strictly construed, but says that the rule is of equal force that the object of the parties is always to be kept in view, and that a construction should be adopted which will carry out the purpose of the appointment. In the case before the court the object was to enable the attorney to convey a title free from any possible claim of the wife, and as that result could be accomplished under the law of Colorado; where the land was situated, by the deed of the husband alone as fully without as with her signature, the court held the deed of the attorney valid. In that case the wife had no interest in the land, and hence the decision cannot be said to be in conflict in any manner with those previously cited. It is true that Mr. Justice Field says that "a power of attorney created by two or more persons possessing distinct interests in real property may, of course, be so limited as to prevent a sale of the interest of either separately; but, in the absence of qualifying terms, or other circumstances, thus restraining the authority of the attorney, a power to sell and convey real property given by several parties, in general terms, as in the present case, is a power to sell and convey the interest of each either jointly with the interests of the others, or by a separate instrument." But this language was not necessary to the decision.

§ 381 b. Execution of power by a partnership.—The rule generally in relation to agencies and trusts is that where power is conferred upon two or more persons, the power must be exercised by all, or its exercise is ineffectual.¹ But this principle does not apply where the power to sell is conferred upon a partnership as such. The partnership in this case becomes the agent, and the individual members of the firm are not constituted separate

¹ Story on Agency, § 42; Rollins v. Phelps, 5 Minn. 463.

agents, but each member is the agent of the firm. If the firm name is signed by one of the members of the firm the power is properly executed.¹ The principal is bound, although the member of the firm signing the principal's name adds his own individual name instead of that of the firm.²

¹ *Frost v. Erath Cattle Co.*, 81 Tex. 505; 26 Am. St. Rep. 831.

² *Deakin v. Underwood*, 37 Minn. 98; 5 Am. St. Rep. 827. See, also, *Gordon v. Buchanan*, 5 Yerg. 71.

CHAPTER XVI.

DEEDS UNDER POWERS OF SALE IN TRUST DEEDS AND MORTGAGES

- § 382. Powers of sale in trust deeds and mortgages.
- § 383. Power of sale irrevocable.
- § 384. Subsequent disabilities.
- § 385. Effect of death upon power of sale.
- § 386. Rule in Texas.
- § 386 a. Liability of trustee.
- § 387. Appointment of new trustee.
- § 388. Power of sale a cumulative remedy.
- § 389. Provisions for sale.
- § 390. Effect of tender upon sale.
- § 391. Rule in Massachusetts.
- § 392. Sale by joint trustees.
- § 393. Sale under unrecorded mortgage.
- § 394. Statutory regulations.
- § 395. Power of sale passing by assignment of mortgage.
- § 396. Sale by administrator of mortgagee.
- § 397. Conveyance of part of the premises.
- § 398. Compliance with the conditions of the power.
- § 399. What notice must be given.
- § 399 a. Personal notice to grantor or subsequent encumbrancers.
- § 400. Publication of notice in newspaper.
- § 401. Extent of circulation.
- § 402. Time of publication.
- § 403. A matter of contract.
- § 404. Publication by posting notices.
- § 405. Authority for the sale.
- § 406. Designation of place of sale.
- § 407. Designation of time of sale.
- § 407 a. Deed silent as to place of sale.
- § 408. Erroneous statements.
- § 408 a. Sale under second deed erroneously referring to prior deed.
- § 409. Description of the property.
- § 410. Sales to *bona fide* purchasers.
- § 411. Sale should be beneficial to debtor.
- § 412. Sale for cash.
- § 413. Trustee's presence at sale.
- § 414. Power to adjourn sale.
- § 415. Release of parcel from mortgage.
- § 416. Requirement of deposit.

- § 417. Right of mortgagee to purchase.
- § 418. Sale voidable only.
- § 419. Waiver.
- § 420. Mortgagee may execute a deed to himself.
- § 421. By whom the deed should be made.
- § 422. Deed to a person other than purchaser.
- § 423. Reference in deed to power.
- § 424. Death of purchaser.
- § 425. Recitals in deed.
- § 426. Growing crops.
- § 427. Sale before default in trust deed passes legal title.
- § 428. Setting aside sale.
- § 429. Agreements between mortgagor and mortgagee.
- § 430. Enjoining sale.

§ 382. Powers of sale in trust deeds and mortgages.

Though the validity of powers of sale in mortgages was at one time seriously questioned,¹ at the present day their validity is universally recognized, and the expensive delays that must result from a suit of foreclosure have brought mortgages with power of sale into quite general use.² When deeds of trust are beneficial to creditors, the assent of the latter to them will be presumed; but if on the contrary their object is to hinder and delay the creditors, their assent must appear.³ And it is competent to show such acceptance on either the part of the trustee or *cestui que trust* by parol evidence.⁴ The power of sale may be contained in an instrument separate from the mortgage or trust deed;⁵ and a right to convey follows as

¹ Croft v. Powell, 2 Comyn, 603; Powell on Mort. 19.

² Mitchell v. Bogan, 11 Rich. 686; Lydston v. Powell, 101 Mass. 77; Turner v. Johnson, 10 Ohio, 204; Kinsley v. Ames, 2 Met. 29; Brisbane v. Stoughton, 17 Ohio, 482; Longwith v. Butler, 8 Ill. 32; Hyman v. Devereux, 63 N. C. 624.

³ Shearer v. Loftin, 26 Ala. 703; Mauldin v. Armstead, 14 Ala. 702; Wiswall v. Ross, 4 Port. 328.

⁴ Crocker v. Lowenthal, 83 Ill. 579; Pope v. Brandon, 2 Stewt. 410; 20 Am. Dec. 49; Mayer v. Pulliam, 2 Head, 347; Scull v. Reeves, 2 Green Ch. 84; 29 Am. Dec. 694; Flint v. Clinton Co., 12 N. H. 432; Brevard v. Neely, 2 Sneed, 164; Spencer v. Ford, 1 Rob. (Va.) 648; Skipwith v. Cunningham, 8 Leigh, 271; 31 Am. Dec. 642; Field v. Arrowsmith, 3 Humph. 442; 39 Am. Dec. 185; Robertson v. Sublett, 6 Humph. 313; Hipp v. Huchett, 4 Tex. 20.

⁵ Brisbane v. Stoughton, *supra*; Alexander v. Caldwell, 61 Ala. 543.

an implication from a right to sell.¹ The terms of the instrument have sometimes been held to imply, necessarily, a power of sale, although generally such power should be expressly conferred.² The trustee should perform his duties with the utmost impartiality, occupying, as he does, the position of agent for both parties.³ The power of sale may be dependent upon various circumstances; default of the mortgagor in the payment of taxes may be selected as an instance.⁴ A power of sale may be altered with consent of the parties by a writing of the same solemnity.⁵ A married woman when competent to execute a mortgage has power to include therein a power of sale.⁶ The fact that the name of the beneficiary is omitted from a trust deed, perfect in other respects, does not render the deed void. As against a purchaser from the trustee with notice of the trust, the provisions of the trust deed may be enforced by the real beneficiary whose name is supplied by the trustee.⁷ In California, a trust deed conveys the legal title to the trustee, while a mortgage is a mere lien.⁸

¹ *Fogarty v. Sawyer*, 17 Cal. 589; *Williams v. Otey*, 8 Humph. 563; 47 Am. Dec. 632. While powers of sale are strictly construed, still a sale is not void or voidable, because made for an amount greater than the debt secured, when there has been no bad faith, but the debtor may receive the surplus: *Savings and Loan Society v. Burnett*, 106 Cal. 514.

² *Mundy v. Vawter*, 3 Gratt. 518; *Purdie v. Whitney*, 20 Pick. 25.

³ *Sherwood v. Saxton*, 63 Mo. 78; *Long v. Long*, 79 Mo. 644; *Ventres v. Cobb*, 105 Ill. 33; *Little Rock etc. R. R. Co. v. Huntington*, 120 U. S. 160; *Bales v. Perry*, 51 Mo. 449; *Meacham v. Steele*, 93 Ill. 135; *Williamson v. Stone*, 128 Ill. 129; *Cassidy v. Cook*, 99 Ill. 385; *In re Mayfield*, 17 Mo. App. 684; *Gimbel v. Pignero*, 62 Mo. 240.

⁴ *Pope v. Durant*, 26 Iowa, 233.

⁵ *Baldrige v. Walton*, 1 Mo. 520.

⁶ *Barnes v. Ehrman*, 74 Ill. 402. See, also, *Young v. Graff*, 28 Ill. 20; *Bartlett v. Bartlett*, 4 Allen, 440.

⁷ *Sleeper v. Iselin*, 62 Iowa, 583.

⁸ *Koch v. Briggs*, 14 Cal. 257; 73 Am. Dec. 651; *Comerais v. Genella*, 22 Cal. 124; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480; *Fuquay v. Stickney*, 41 Cal. 583. See, also, *More v. Calkins*, 95 Cal. 435; 29 Am. St. Rep. 128; *Thompson v. McKay*, 41 Cal. 221. As to the strictness with which trust deeds should be construed, see *Davis v. Hess*, 103 Mo. 31; *Waller v. Arnold*, 71 Ill. 350.

§ 383. Power of sale irrevocable.—A mere naked power may be revoked at will, but the rule is that when a power is coupled with an interest it is irrevocable. As powers of sale in mortgages and trust deeds are of this character, it follows that such powers are irrevocable. The power of sale is an essential and valuable part of the security, and follows it into whatever hands it may pass.¹ If, however, a debtor simply authorizes by a power of attorney a creditor to sell property, and, after paying his claim, to account for the balance of the proceeds, the power is not connected with the estate and may be revoked at any time.²

§ 384. Subsequent disabilities.—It being conceded that a power of sale is irrevocable, it follows conclusively that the validity of the power is not affected by any sub-

¹ *Calloway v. People's Bank of Bellefontaine*, 54 Ga. 441; *Wilson v. Troup*, 7 Johns. Ch. 25; *Varnum v. Meserve*, 8 Allen, 158; *Wiswall v. Rose*, 4 Port. 321; *Hyde v. Warren*, 46 Miss. 13; *Walker v. Crowder*, 2 Ired. Eq. 478; *Bergen v. Bergen*, 1 Caines Cas. in Er. 1; *Doe v. Duval*, 1 Ala. 745; *Hannah v. Carrington*, 18 Ark. 104; *Wilbur v. Spofford*, 4 Sneed, 698; *Stimpson v. Fries*, 2 Jones Eq. 156; *Bancroft v. Ashurst*, 2 Grant Cas. 513; *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234; *Buell v. Underwood*, 65 Ala. 285; *Berry v. Skinner*, 30 Md. 567; *Strother v. Law*, 54 Ill. 413; *Connors v. Holland*, 113 Mass. 50; *Hunt v. Rousmaniere*, 8 Wheat. 174; *Bradley v. Chester Valley R. R. Co.*, 36 Pa. St. 141; *Brewer v. Winchester*, 2 Allen, 389; *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106; *Collins v. Hopkins*, 7 Iowa, 463; *De Jarnette v. De Giverville*, 56 Mo. 440; *Hodges v. Gill*, 9 Baxt. 378; *White v. Stephens*, 77 Mo. 452; *Berry v. Skinner*, 30 Md. 567; *Bell v. Twilight*, 22 N. H. 500; *McGuire v. Van Pelt*, 55 Ala. 344; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; 84 Am. Dec. 298; *Canfield v. Monger*, 12 Johns. 347; *Pickett v. Jones*, 63 Mo. 195; *Taylor v. Benham*, 5 How. (U. S.) 269.

² *Mansfield v. Mansfield*, 6 Conn. 559; 16 Am. Dec. 76. In *Calloway v. The People's Bank of Bellefontaine*, 54 Ga. 441, 449, Mr. Justice McKay, in delivering the opinion of the court, says, with reference to the effect of the provisions of the code declaring that a mortgage does not pass a title, upon a power of sale, that: "The idea is, we think, a fanciful one, that such a power is not coupled with an interest. The mortgagee *has*, as we have seen an interest, and an interest in the thing. It is pledged to him; he is a purchaser of that interest, and a court of equity will protect him in it, and will protect it for him. We see nothing in this declaration of the code, that a mortgage is only a security; that negatives the idea that a power to sell in a mortgage is a power coupled with

sequent disability of the mortgagor. If he was laboring under no legal disability at the time the power of sale was executed, the power remains valid until it has been fully exercised. For instance, the subsequent bankruptcy of the mortgagor can have no effect upon the power. The assignee's rights are subject to those of the mortgagee.¹ Nor is the power of sale revoked or suspended by the subsequent insanity of the mortgagor;² and the mortgagee cannot be deprived of this method of enforcing his claim by an application on the part of the guardian or committee of a lunatic for permission to dispose of the mortgaged property for the benefit of the creditors of such lunatic.³ Where in time of war the mortgagor volun-

an interest. The two ideas are just as consistent and harmonious as the idea of the English chancery court, as to the nature of a mortgage, was with a power of sale. Indeed, it is mainly in chancery courts, all of which treat a mortgage as only a security, and universally recognize the property to belong to the mortgagee, that the whole doctrine of powers to sell, attached to a mortgage, is expounded and announced."

¹ *Hall v. Bliss*, 118 Mass. 554; 19 Am. Rep. 476; *Dixon v. Ewart*, 3 Mer. 321; *McGready v. Harris*, 54 Mo. 137; *Long v. Rogers*, 6 Biss. (U. S.) 414.

² *Encking v. Simmons*, 28 Wis. 272; *Haggart v. Ranger*, 15 Fed. Rep. 860; *Meyer v. Kuechler*, 10 Mo. App. 371; *Berry v. Skinner*, 30 Md. 567; *Davis v. Lane*, 10 N. H. 156.

³ *Davis v. Lane*, *supra*; *Berry v. Skinner*, *supra*. In the latter case, Alvey, J., in delivering the opinion of the court, said (p. 574): "The mortgagee cannot be suspended in his rights, because of the misfortunes of the mortgagor, nor of his lunacy, any more than any other misfortune, unless provided for in the contract. That a mere authority, not coupled with an interest, nor intended as a security, ceases or is suspended by the insanity of the principal, is clear beyond dispute; but the principle that insanity operates as a revocation, cannot apply where the power is coupled with an interest so that it can be executed in the name of the donee or trustee. Nor can the proceedings in lunacy, and the application of the committee for an order to sell the mortgaged premises for the benefit of creditors generally, have the effect to suspend the execution of the power by the mortgagee. He, the mortgagee, was constituted a trustee by the mortgage itself to sell the mortgaged property, on default of payment, and the court has no power to deprive him of the summary means of realizing his debt that formed a part of the security upon which he advanced his money." The power, then, not being affected by the lunacy of the mortgagor, and all the prerequisites to its execution having been complied with, it becomes the right of the purchaser, as well as the right of the mortgagee, that the sale should be sus-

tarily leaves home and takes part with the enemy, the exercise of the power of sale is not affected by the fact that the mortgagor is at the time within the enemy's lines.¹

§ 385. **Effect of death upon power of sale.**—With the exception of Texas, there is in the different States a complete unanimity of opinion upon the effect that the death of the mortgagor exercises over a power of sale. As this power is coupled with an interest, no act of the mortgagor can suspend or revoke it. As stated in the preceding section, the disability of insanity or bankruptcy does not in any manner affect it. There can then be no reason for making the death of the mortgagor an exception. While the death of the mortgagor may take away the right of executing the power in his name, yet the right to exercise it on the contingency provided for by the parties still remains. These are the views taken by the authorities, and it may therefore be asserted as an established proposition that the death of the mortgagor does not operate as a revocation of the power.² Where it is pro-

tained. And in the absence of irregularity, fraud, or unfairness in executing the power, the court has no alternative, however harsh and severe the proceeding may appear to be, but to ratify the sale."

¹ *Ludlow v. Ramsey*, 11 Wall. 581; *Washington University v. Finch*, 18 Wall. 106; *De Jarnette v. De Giverville*, 56 Mo. 440; *Harper v. Ely*, 56 Ill. 179. See, also, *Bush v. Sherman*, 80 Ill. 160; *Mitchell v. Nodaway County*, 80 Mo. 257; *Reilly v. Phillips*, 4 S. D. 604.

² *Brewer v. Winchester*, 2 Allen, 389; *Wright v. Rose*, 2 Sausse & S. 323; *Connors v. Holland*, 113 Mass. 50; *Hodges v. Gill*, 9 Baxt. (Tenn.) 378; *Hunt v. Rousmanier*, 8 Wheat. 174; *Varnum v. Meserve*, 8 Allen, 158; *Corder v. Morgan*, 18 Ves. 344; *De Jarnette v. De Giverville*, 56 Mo. 440; *Bell v. Twilight*, 22 N. H. (2 Fost.) 500; 18 N. H. 159; 45 Am. Dec. 367; *Hyde v. Warren*, 46 Mass. 13; *More v. Calkins*, 95 Cal. 435. And see *Strother v. Law*, 54 Ill. 413; *Bradley v. Chester Valley R. R. Co.*, 36 Pa. St. 141; *Collins v. Hopkins*, 7 Iowa, 463. In *Varnum v. Meserve*, 8 Allen, 158, Hoar, J., delivering the opinion of the court, said: "When the power of sale is to be executed in the name of the mortgagee, we can have no doubt that it may be executed as well after the death of the mortgagor as before. It is a power coupled with an interest, and not merely an interest in the proceeds of the property, for the sale of which the power is given, but in the property itself. Strictly speaking, a mortgage vests the whole legal estate in the mortgagee. His title to the land

vided in the trust deed that the sheriff may sell in the event of the death or disability of the trustee, the sheriff has power to sell, notwithstanding the death of the grantor, whenever the contingency upon which he is to sell arises.¹ As the death of the grantor does not revoke the power or limit the effect of the deed of trust, the failure to present to the administrator of the deceased grantor the claims secured by the deed, does not authorize a court of equity to cancel the deed.²

§ 386. In Texas.—But in Texas, a peculiar view is taken of the effect of the mortgagor's death. It is not denied that such a power, as a general rule of law, cannot be revoked, yet it is held that the probate law requiring liens upon property to be enforced in court, renders the execution of the power incompatible with the administration of the estate as provided for by statute. The construction placed upon the statutes of Texas by the courts of that state give the mortgage creditor priority over such claims as he is entitled to in the course of administration, but deny to him the exercise of the power of sale upon the

is complete as a legal title, and the power of sale is to relieve him of the equities attached to the mortgage. The power is to be executed out of the estate conveyed, and is not merely collateral to it." When a mortgage is foreclosed after the death of the mortgagor, and his estate is insolvent, the mortgagee is merely a trustee of the surplus, and cannot retain it in his possession for the purpose of paying another debt due to him from the mortgagor, as this would give him a preference over the other creditors: *Talbot v. Frere*, Law R. 9 Ch. D. 568. If an assignee in bankruptcy is appointed, the surplus will go to him: *Calloway v. People's Bank of Bellefontaine*, 54 Ga. 441. See, as to the effect of death of grantor in a deed of trust for benefit of creditors, *Spencer v. Lee*, 19 W. Va. 179.

¹ *White v. Stephens*, 77 Mo. 452.

² *More v. Calkins*, 95 Cal. 435; 29 Am. St. Rep. 128; *Whitmore v. S. F. Savings Union*, 50 Cal. 145. In the case of *Whitmore v. S. F. Savings Union*, *supra*, Mr. Justice Crockett filed a dissenting opinion. See, also, *Bull v. Coe*, 77 Cal. 63; 11 Am. St. Rep. 235. Where a trustee, "his heirs, executors, administrators and assigns" are authorized to sell, and at the time the mortgage is made, the trustee has no interest in the estate or in the debt, the power on his death does not pass to his legal representative. The designation "executors" is not a naming of a person authorized to sell: *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283.

death of the mortgagor.¹ His claim is, however, postponed to the payment of the expenses of the last sickness, the expenses of administration, allowances in lieu of homestead, property exempt from execution, and the homestead, though the wife may have released it in the mortgage.²

§ 386a. Liability of trustee.—In the absence of passion, prejudice, or corrupt motives, the trustee is not lia-

¹ *Robertson v. Paul*, 16 Tex. 472; *Buchanan v. Monroe*,^{*} 22 Tex. 537. See, also, *Lathrop v. Brown*, 65 Ga. 312; *Johnson v. Johnson*, 27 S. C. 309; 13 Am. St. Rep. 636; *Miller v. McDonald*, 72 Ga. 20; *Darrow v. St. George*, 8 Col. 592. But see *Calloway v. People's Bank*, 54 Ga. 441.

² *Baits v. Scott*, 37 Tex. 59; *McLane v. Paschal*, 47 Tex. 365. For the purpose of showing the law in that state, we quote the following from the opinion of the court in *McLane v. Paschal*, *supra*: "With whatever force of reason those who have sought to maintain a different conclusion have endeavored to impress their views, and however unsatisfactorily as it may seem to them their arguments may have been met, it must be admitted that it is now finally and definitely settled by this court that a deed of trust to secure the payment of a debt does not operate as an absolute transfer of the property to which it refers, to the trustee, upon the conditions therein stipulated; but that such instrument is in legal effect a mere mortgage with power to sell. And though the death of the mortgagor does not, on general principles, revoke this power, yet its exercise by the trustee would be inconsistent and in conflict with our statutes governing the settlement of estates of deceased persons. It cannot, therefore, be executed by the trustee after the death of the constituent. And whatever rights may be secured to the creditor by such deed, they can only be enforced, after the death of the debtor, through and by the aid of the court. It naturally, if not inevitably follows, that such deed, instead of operating as an absolute and unconditional security for the payment of the debt for which it purports to be given, has this effect only during the life of the debtor. And after his death it only secures the creditor priority over such claims against the debtor's estate, as by the statute it is entitled to in the due course of administration. And it is not now open to controversy that funeral expenses, expenses of last sickness, expenses of administration, and those incurred in the preservation and management of the estate, as well as the allowances authorized to be made to the widow and children in lieu of a homestead, and other property exempt from forced sale, where such property does not exist in kind, have preference over specific liens credited in the lifetime of the decedent, except where such lien is a security for the purchase money of the property to which it is attached." And see *Lathrop v. Brown*, 65 Ga. 312.

ble because he has made mistakes in judgment.¹ He is the agent for both parties, and must act with entire fairness to each.² If he abuses his powers, or fails to employ such diligence in the performance of his duties as may reasonably be expected of him, he is personally liable in damages to any person injured by his acts, or failure properly to act.³ A court of equity may remove a trustee if there exists between him and the *cestui que trust* a strong feeling of personal ill-will.⁴ Where an officer is authorized by statute to act in place of the trustee, the officer and the sureties on his official bond are liable for any wrongful acts committed by him.⁵ The rule applicable to all positions where confidence is reposed by one in another, governs the relation between a trustee and those for whom he is acting. He should have no personal interest in the debt for which the trust deed is security.⁶ He should comply strictly and fairly with all directions the trust deed may contain as to the method in which the power must be exercised.⁷ A trustee is not required to abandon a sale because notice is given to him at the time of the sale, that the deed of trust was executed for the purpose of defrauding.⁸ If the trustee's action is controlled by hostility to the beneficiary, this is sufficient cause for the removal of the trustee.⁹ Unless the trust deed expressly so provides, the trustee cannot delegate his authority to another; the

¹ Webber v. Curtiss, 104 Ill. 309; Ventres v. Cobb, 105 Ill. 33.

² Graham v. King, 50 Mo. 22; 11 Am. Rep. 401; Bales v. Perry, 51 Mo. 449; Ventres v. Cobb, *supra*; Williamson v. Stone, 128 Ill. 129.

³ Sherwood v. Saxton, 63 Mo. 78; Murrell v. Scott, 51 Tex. 420.

⁴ McPherson v. Cox, 96 U. S. 404. The court, while conceding the principle, found that as a matter of fact the circumstances did not justify a change.

⁵ White v. Stephens, 77 Mo. 452; State v. Griffith, 63 Mo. 545; Beal v. Blair, 33 Iowa, 318.

⁶ Gimbel v. Pignero, 62 Mo. 240; Long v. Long, 79 Mo. 644; In re Mayfield, 17 Mo. App. 684.

⁷ Hall v. Towne, 45 Ill. 493; Sears v. Livermore, 17 Iowa, 297; 85 Am. Dec. 564; Ormsby v. Tavacson, 3 Litt. (Ky.) 404; Ingle v. Culbertson, 43 Iowa, 265; Smith v. Provin, 4 Allen, 516.

⁸ Erwin v. Hall, 18 Ill. App. 315.

⁹ Gartside v. Gartside, 113 Mo. 348.

position is one of personal trust and confidence.¹ Where a trustee afterward secures the legal title, he cannot release the trust to the injury of holders of indebtedness secured by the deed. His acts after he has obtained the title are not treated as those of a trustee.² A mortgagee clothed by the mortgage with a power of sale must likewise be held to the exercise of good faith.³ In considering whether the instrument is to be treated as a mortgage or a deed of trust, the fact that it is made, not to a third party, but directly to the creditor, is immaterial. The solution of this question must depend upon the nature of the instrument as shown by its terms.⁴ A trustee is the agent of both parties, and must look to the interest of both.⁵

§ 387. Appointment of new trustee.— If the trustee named in the deed of trust dies, or refuses to accept, the court may appoint a new trustee at the suit of the parties interested.⁶ Where a trustee has taken up a permanent residence in another state, and a railroad mortgage contains a clause that a majority of the bondholders, upon the death, removal, or incapacity of the trustee, may select in writing a person to take his place, the new trustee so selected will be recognized by the courts, and the

¹ *Landrum v. Union Bank*, 63 Mo. 48; *Brickenkamp v. Rees*, 69 Mo. 426; *Spurlock v. Sproule*, 72 Mo. 503; *Bales v. Perry*, 51 Mo. 451; *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401; *Harper v. Mansfield*, 53 Mo. 17; *Doe v. Robison*, 24 Miss. 688; *Grover v. Hale*, 107 Ill. 638; *Flower v. Elwood*, 66 Ill. 438; *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542; *Foster v. Strong*, 5 Ill. App. 223; *Powell v. Tuttle*, 3 N. Y. 397; *Bitter v. Calhoun*, 8 S. W. Rep. (Tex.) 523; *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59.

² *Smith v. Perkins*, 8 Biss. 73.

³ *Longwith v. Butler*, 8 Ill. 32; *Meacham v. Steele*, 93 Ill. 135; *Montague v. Dawes*, 14 Allen, 369; *Thompson v. Heywood*, 120 Mass. 401; *Thornton v. Irwin*, 43 Mo. 153; *Drinan v. Nichols*, 115 Mass. 353; *Markey v. Langley*, 92 U. S. 142; *Briggs v. Briggs*, 135 Mass. 306; *Bedell v. McClellan*, 11 How. Pr. 172; *Horsey v. Hough*, 38 Md. 130; *Hoffman v. Anthony*, 6 R. I. 282; 75 Am. Dec. 701.

⁴ *More v. Calkins*, 95 Cal. 435; 29 Am. St. Rep. 128.

⁵ *Hartman v. Evans*, 30 W. Va. 669.

⁶ *Clark v. Wilson*, 53 Miss. 119. See *Glenn v. Busey*, 4 McAr. 454.

other will be restrained from performing any act as trustee.¹ A person is not disqualified from acting as trustee because he acted as attorney in fact of the creditor in selling the property to the mortgagor.² Where a *cestui que trust* has the power to appoint a new trustee, the assignee of the former trustee cannot make the appointment, unless expressly authorized by the donor.³ A trustee is not compelled to accept the trust, but if he does so he cannot abandon it without a decree of the court, or the consent of the parties interested.⁴

§ 388. Power of sale a cumulative remedy.—A power of sale is a cumulative remedy, and does not deprive a party of the right to foreclose in equity, as he might do in the absence of any power of sale.⁵ When a power of

¹ *Farmers' Loan & Trust Co. v. Hughes*, 11 Hun, 130.

² *Sternberg v. Valentine*, 6 Mo. App. 176.

³ *Clark v. Wilson*, 53 Miss. 119.

⁴ *Drane v. Gunter*, 19 Ala. 731; *Sargent v. Howe*, 21 Ill. 148. Said the court, in the latter case: "A court of equity has jurisdiction of trusts and trustees; and rather than a trust shall fail from death, or the disability of a trustee to act, or when he is not a proper person to execute the trust, will appoint a suitable trustee. And a court of equity, in case of neglect or refusal of a trustee to perform the duties devolving upon him under the trust, will, upon a proper application, compel him to execute it. Such a jurisdiction is peculiar to a court of equity, and doubtless originated from the necessity of preventing fraud and injustice. When confidence has been reposed in the trustee, and he has undertaken to perform the trust, it would be manifestly unjust to permit him to deprive the parties in interest of all benefit in the trust fund. If the trustee, after receiving title to property in trust, as a pledge for the payment of a debt of a third party, might refuse to apply it according to the terms of the trust deed, and the court were not to afford relief, it would be to tolerate great injustice. But such is not the law."

⁵ *Fogarty v. Sawyer*, 17 Cal. 589; *Comerais v. Genella*, 22 Cal. 116; *Green v. Gaston*, 56 Miss. 748; *McGowan v. Branch Bank at Mobile*, 7 Ala. 823; *Youngman v. Elmira & Williamsport R. R. Co.*, 65 Pa. St. 278; *McAllister v. Plant*, 54 Miss. 106; *Wayne v. Hanham*, 9 Hare, 62; s. c. 20 Law J. 530; *Atwater v. Kinman*, Har. (Mich.) 243; *State Bank of Bay City v. Chapelle*, 40 Mich. 447; *McDonald v. Vinson*, 56 Miss. 497; *Carradine v. O'Connor*, 21 Ala. 573; *Vaughan v. Marable*, 64 Ala. 60; *Marriott v. Givens*, 8 Ala. 694; *Myers v. Estell*, 48 Miss. 372; *Morrison v. Bean*, 15 Tex. 267; *Frierson v. Blanton*, 1 Baxt. (Tenn.) 272; *Wofford v. Board of Police of Holmes Co.*, 44 Miss. 579; *Webb v. Haeffer*, 53 Md. 187; *Hurd v. Case*, 32 Ill. 45; 83 Am. Dec. 249; *Funk v. McRey-*

sale upon the death of the trustee is enforced by the court, the sale is considered as being made by virtue of the power and not of the decree.¹ The court cannot nullify the terms of the deed of trust when simply enforcing it, and if it appoints a commissioner to make the sale in place of the trustee, he must follow the deed as to the conditions of sale and the manner in which it is to be conducted.² A sale may be made under the power, although a bill for foreclosure may have been filed, and the bill is at the time still pending.³

§ 389. Provisions for sale.—It is not necessary to use any particular word or form of words to create the power. The sale must be made in conformity with the provisions of the instrument, and as to these, the parties may make any regulations which they see proper. They may impose conditions upon the exercise of the power, and the title of the purchaser at a sale under the power will depend upon the faithful compliance with these conditions.⁴ A power of sale may be inserted in a deed from the grantor, and be exercised without the existence of any separate mortgage or trust deed. Thus, when the promissory notes

nolds, 33 Ill. 496; *Ryan v. Newcomb*, 125 Ill. 91; *White v. Savery*, 50 Iowa, 515; *Alexander v. Central R. Co.*, 3 Dill. 487; *Huston v. Seeley*, 27 Iowa, 183; *Crocker v. Robinson*, 8 Iowa, 404; *Fanning v. Kerr*, 7 Iowa, 450; *Brickell v. Batchelder*, 62 Cal. 623; *Atwater v. Kinman*, 1 Wis. 420; *America etc. Mortgage Co. v. McCall*, 96 Ala. 200; *Charleston v. Caulfield*, 19 S. C. 201; *First Nat. Bank v. Bell Silver Mining Co.*, 8 Mont. 32; *Knox v. McCain*, 13 Lea, 197; *Denver Brick etc. Co. v. McAllister*, 6 Col. 261.

¹ *Rice v. Brown*, 77 Ill. 549; *Doolittle v. Lewis*, 7 Johns. Ch. 45; 11 Am. Dec. 389; *Holden v. Stickney*, 2 McAr. 141; *Staats v. Bigelow*, 2 McAr. 367. See *Wilkins v. Gordon*, 11 Leigh, 547.

² *Crenshaw v. Seigfried*, 24 Gratt. 272.

³ *Brisbane v. Stoughton*, 17 Ohio, 482. A mortgagee or trustee cannot, unless the instrument so provides, claim compensation for his services on making the sale: *Allen v. Robbins*, 7 R. I. 33. See *Catlin v. Glover*, 4 Tex. 151; *Myer v. Hart*, 40 Mich. 517; 29 Am. Rep. 553; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334; *Lime Rock Bank v. Phettable*, 8 R. I. 56.

⁴ *Graeme v. Cullen*, 23 Gratt. 266. A power of sale includes the power to convey: *Lang v. Stansel* (Ala., Apr. 23, 1895), 17 So. Rep. 519.

of the grantee are taken for the purchase money, the deed may provide that if the grantee fail to pay the notes at maturity, the sheriff of the county shall sell the land, convey the title to the purchaser at the sale, and deliver the proceeds of the sale to the grantor or the holder of the notes. Although the title of the land passes by the deed to the grantee, the sheriff has in such case the power to sell and convey.¹ When the sheriff of the county or any other person is designated in the deed of trust, as the substitute of the trustee in case of his death or absence, a third person cannot, by an *ex parte* proceeding instituted by the holder of the obligation, be appointed trustee.² When the intention to confer a power of sale upon the mortgagee can be collected from the whole instrument, the power is not nullified by describing the person having the power to sell as the party of the first part, who, as the term was used in the mortgage, was the mortgagor.³ It is customary in all deeds of trust to name the place where the sale is to be made, and to prescribe the kind and length of notice the trustee is to give of the sale. But if the duties of the trustee in these matters are not defined in the deed, he may exercise his discretion, and the court will uphold a sale made by him, when he honestly uses his best judgment in these matters.⁴

¹ Moore v. Lackey, 53 Miss. 85.

² Bacigalupo v. Lallement, 7 Mo. App. 595.

³ Gaines v. Allen, 58 Mo. 537.

⁴ Ingle v. Culbertson, 43 Iowa, 265. In this case the opinion of the court was delivered by Mr. Chief Justice Seevers, who said: "When the trust was executed the grantor resided in Iowa, the trustees in the District of Columbia, and the beneficiary in the State of Virginia, and it is insisted that the grantor had the right to presume the trustees, under the discretion vested in them, would sell the property, if such sale became necessary to satisfy the trust, in the county where situated, and that the notice of sale would be similar to those required in judicial sales of real estate. It must be presumed the trustees were mutually selected by the parties, and were satisfactory to them. Hence, there were reposed in the trustees large discretionary powers, which should be reasonably executed. It was competent, and is perhaps usual, to more clearly define and limit the discretion of the trustees, and in the exercise of this right it could have been provided that the sale of the premises should take place in the county where the property was situate, and the

§ 390. **Effect of tender upon sale.**—With respect to the effect that a tender of the amount due has upon the mortgage after a breach of the condition, and before a sale has been effected under the power, the rule adopted in England, and in some of the States of the Union, is that the mortgagee is compelled to abandon the sale.¹ By the principles of the common law, a mortgage is not discharged by a tender after the breach of the condition. To be of advantage, the tender must be kept good, and its effect is simply to prevent the running of interest in the future, to preserve the right to redeem, or to save the debtor from the costs of a suit for redemption.² In some of the States the rule is, that the lien of the mortgage is discharged as fully as if payment were made by a tender of the amount due upon the mortgage after the time agreed upon for payment. Of course, the personal responsibility of the debtor is not affected, but the tender has the effect of discharging the lien, and it is not essential to bring the money, or keep the tender

kind and character of the notice to be given, strictly prescribed. But that the presumption can be indulged as claimed by counsel is at least doubtful, and which we deem it unnecessary to determine. . . . It is undoubtedly true that, as a general rule, where a power directs that a given thing must be done in a particular and specified manner, and there has been a total failure to comply, the execution of the power in such manner is void. Where a discretion is vested, as in this case, in trustees, as to the mode and manner the power shall be executed, and there is no testimony showing or tending to show actual fraud, but an honest though mistaken exercise of judgment in the determination of the discretionary power vested in them, we are of opinion, and so hold, that the sale is not absolutely void, but voidable only at the election of the parties interested." As to sufficiency of language to confer a power of sale, see *Hyman v. Devereux*, 63 N. C. 624.

¹ *Jenkins v. Jones*, 2 Giff. 99; s. c. 6 Jur., N. S., 391; *Cameron v. Irwin*, 5 Hill, 272; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Whitworth v. Rhodes*, 20 Law J., N. S., 104.

² *Currier v. Gale*, 9 Allen, 522; *Shields v. Lozear*, 34 N. J. L. 496; 3 Am. Rep. 256; *Maynard v. Hunt*, 5 Pick. 240; *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37; *Phelps v. Sage*, 2 Day, 151; *Storey v. Krewson*, 55 Ind. 397; 23 Am. Rep. 668; *Greer v. Turner*, 36 Ark. 17; *Schearff v. Dodge*, 33 Ark. 340; *Rowell v. Mitchell*, 68 Me. 21; *Alexander v. Caldwell*, 61 Ala. 543; *Holman v. Bailey*, 3 Met. 55; *Erskine v. Townsend*, 2 Mass. 493; 3 Am. Dec. 71.

good.¹ But when a mortgagor comes into a court of equity asking relief, he must do equity by paying the mortgage debt, but may avail himself of the tender for discharging the interest.² To obtain the benefit of this rule, that a mortgage is discharged by a tender, the proof as to the making and refusal of the tender must be clear, and the full amount must be unconditionally tendered.³

¹ This is the rule in New York: *Kortright v. Cady*, 21 N. Y. 343; 78 Am. Dec. 145; *Hartley v. Tatham*, 1 Keyes, 222; *Jackson v. Crafts*, 18 Johns. 110; *Houbie v. Volkening*, 49 How. Pr. 169; *Edwards v. Farmers' etc. Co.*, 21 Wend. 467; s. c. 26 Wend. 541. In Missouri: *Thornton v. Nat. Exchange Bank*, 71 Mo. 221. In Michigan: *Ferguson v. Popp*, 42 Mich. 115; *Van Huse v. Kanouse*, 13 Mich. 303; *Potts v. Plaisted*, 30 Mich. 149; *Caruthers v. Humphrey*, 12 Mich. 270; *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468. See, also, *Olmstead v. Tarsney*, 69 Mo. 396; *Cupples v. Galligan*, 6 Mo. App. 62; *Swett v. Horn*, 1 N. H. 332; *Bailey v. Metcalf*, 6 N. H. 156; *Robinson v. Leavitt*, 7 N. H. 73; *Harris v. Jex*, 66 Barb. 232; s. c. 55 N. Y. 421; 14 Am. Rep. 285; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; 26 Am. Rep. 627; *Graham v. Linden*, 50 N. Y. 547.

² *Cowles v. Marble*, 37 Mich. 158.

³ *Parks v. Allen*, 42 Mich. 482; *Tuthill v. Morris*, 81 N. Y. 94; *Canfield v. Conkling*, 41 Mich. 371. In *Tuthill v. Morris*, *supra*, the court, per Rapallo, J., said: "In view of the serious consequences resulting from the refusal of such a tender, the proof should be very clear that it was fairly made, and deliberately and intentionally refused by the mortgagee, or some one duly authorized by him, and that sufficient opportunity was afforded to ascertain the amount due. At all events, it should appear that a sum was absolutely and unconditionally tendered, sufficient to cover the whole amount due. The burden of that proof is on the party alleging the tender. But even if a sufficient tender had been made out, this action could not, in our judgment, be maintained. Although the authorities cited sustain the proposition that when a tender has been made of the full amount due, it will discharge the lien, and be a good defense against its enforcement, without the tender being kept good, yet we are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks in this action, and which the judgment awards him, viz., the extinguishment of the mortgage. A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt, by way of penalty, for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interests and costs subsequently accruing, and to entitle him to this relief, he should have kept his tender good from the time it was made.

If a deed of trust provides that the whole amount of the principal and interest shall become due upon any default, and that the trustee shall thereupon have authority to sell, if the debtor makes a tender of the amount due with costs before the sale, he is entitled in equity to have the proceedings for a sale stayed; and a sale made by the trustee may be set aside.¹

§ 391. In Massachusetts.—In Massachusetts, however, the trustee's right to sell under the power is not taken away by a tender of the amount due, after a breach of the condition and before the sale. The courts of that State take the view that the right to sell being a power coupled with an interest, attaches at once and cannot be revoked, and a tender is allowed to have merely the effect of a foundation for a suit in equity to redeem. By giving the purchaser notice before or at the sale of the prior tender, the mortgagor may retain against him his right to redeem; but a sale under the power transfers the legal title and possession, which the mortgagor must again obtain by a decree of a court of equity before he can obtain or defend a writ of entry against persons claiming under the mortgage. The fact that the purchaser had notice before the sale of the tender does not affect his title.²

§ 392. Sale by joint trustees.—Where two or more persons have power under a mortgage or trust deed to sell, the power should be exercised by all.³ Trustees may act separately if the instrument so provides, but if they elect

If any further advantage is gained by a tender of the amount of the mortgage debt, it must rest on strict legal, rather than on equitable, principles. The circumstance that a security has become or is invalid in law, and could not be enforced, even in equity, does not entitle a party to come into a court of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably due thereon."

¹ *Whelan v. Reilly*, 61 Mo. 565; *Flower v. Elwood*, 66 Ill. 438.

² *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106. See *Montague v. Dawes*, 12 Allen, 397.

³ *Black v. Smith*, 4 McAr. 338; *Powell v. Tuttle*, 3 Comst. 396; *Wilson v. Troup*, 2 Cowen, 195; 14 Am. Dec. 458. And see *Robinson v. Childs*, 74 Ala. 254.

to act jointly, as by joining in the notice of sale, one cannot act alone.¹ "It is a general rule that trustees have equal power, interest, and authority with respect to the trust estate. They cannot, therefore, act separately; but they must all join in any sale, lease, or other disposition of the trust property, and also in receipt of money payable to them in respect of their office. It is true that the deed gave the trustees authority to act separately or jointly in making the sale. But it seems they elected to act jointly, and accordingly gave notice of the sale in their joint names; and having so made their election, it was not competent for one of them afterward to deny the authority of his cotrustee and act alone."² "Where two or more persons are authorized to execute a trust or power jointly, of course they are not authorized to execute it severally, unless such authority be also given by the instrument creating the trust or power. That instrument being the only source of the authority, of course there can be no authority which does not flow from that source. A trust or power given to two or more is *joint* only, unless words be added making it *several* also. But while one or two or more joint trustees cannot execute the trust severally, it is perfectly competent for the author of the trust to empower the trustees to act severally, as well as jointly; and in that case, the act of one of the trustees, in pursuance of the trust, is just as valid as if he only had been appointed to execute it."³ Though the deed does not so expressly provide, yet where there are several trustees under a deed of trust, the survivors, upon the death of one or more of them, may execute the trust.⁴

¹ White v. Watkins, 23 Mo. 423.

² White v. Watkins, 23 Mo. 430, per Scott, J.

³ Graeme v. Cullen, 23 Gratt. 266, 276. And see Taylor v. Dickinson, 15 Iowa, 483; Townsend v. Wilson, 3 Madd. 261; Franklin v. Osgood, 14 Johns. 527; Hind v. Poole, 1 Kay & J. 383; 41 Jur., N. S., 371.

⁴ Hannah v. Carrington, 18 Ark. 85; Franklin v. Osgood, 14 Johns. 527. And see Goss v. Singleton, 6 Gill, 487; Greenleaf v. Queen, 1 Peters, 138; Gibbs v. Marsh, 2 Met. 243; Goss v. Singleton, 2 Head, 267; Maudlin v. Armistead, 14 Ala. 702. If there is a provision that the mortgagee may retain all expenses and costs of sale, he is entitled to a reasonable

§ 393. **Sale under unrecorded mortgage.**—A mortgagor cannot object to the validity or regularity of sale on the ground that the power of sale has not been recorded. "The power to the mortgagee to sell contained in the mortgage, must be recorded before the deed to the purchaser under the power be executed; but that is for the benefit of the purchaser only, to perpetuate the evidence of the authority by which the sale was made; and the mortgagor cannot impeach the sale, if the power is not recorded."¹ The assignee of a mortgage containing a power of sale has power to sell, and the fact that he omits to record the assignment will not prevent him from selling, or invalidate the sale when nobody is misled by such omission.²

§ 394. **Statutory regulations.**—But it is now provided in some of the States, that before a valid sale can be made under a power of sale in a mortgage, the latter must be recorded. In New York, where the premises embraced

sum for legal advice, and for his own time and attention: *Varnum v. Meserve*, 8 Allen, 158. See *Marsh v. Morton*, 75 Ill. 621.

¹ *Wilson v. Troup*, 2 Cowen, 195, 235; 14 Am. Dec. 458, per Sutherland, J. See, also, *Jackson v. Colden*, 4 Cowen, 266; *Bergen v. Bennett*, 1 Caines Cas. in Er. 1, 17, 18; 2 Am. Dec. 281; *Berry v. Mut. Ins. Co.*, 2 Johns. Ch. 611; *Jackson v. Dubois*, 4 Johns. 216.

² In *Montague v. Dawes*, 12 Allen, 397, Colt, J., said: "It seems that the assignment from Rue to Dawes was not recorded until after the sale, but we can see no good reason why this fact alone, unaccompanied with the suggestion that it was not recorded from improper motives, or that, in some way, the circumstances actually affected the sale by misleading purchasers or otherwise, should operate to defeat a title acquired under it, and in favor of this plaintiff, who it seems had actual notice of the unrecorded assignment, and as appears by the answer and recorded proofs of the sale, personal notice, in addition to the public notice by advertisement of the time and place of sale. Indeed, if the necessities of the case required, it might be well contended that under the circumstances, it was the manifest duty of the plaintiff, if he intended to rely on his right to redeem the premises against a purchaser at the sale, to attend the sale and give notice of his purpose, and that in equity he will not now be entitled to relief, having neglected with reasonable diligence to assert his equitable title, and waited until the owner may have added largely to the estate, or it has increased in value by a general rise, before bringing his bill."

in the mortgage consist of distinct farms or tracts of land situated in different counties, the mortgage must be recorded in the clerk's office of each of the counties. If the mortgage is not so recorded, a sale of the premises in the county in which it is unrecorded will not be valid.¹

§ 395. Power of sale passing by assignment of mortgage.—Where no words of restriction are used, a power of sale passes to the assignee by a legal assignment of the mortgage.² An assignment, to be effectual as a transfer of the power of sale, must comply with the provisions of the statute when the matter has been regulated by statute, or be made in such a mode as would be considered operative at common law. A mortgagee does not divest himself of a power of sale by an assignment consisting of an informal indorsement without any transfer of the note. The power of sale does not thereby pass to the assignee.³ A sale is void where the advertisement has been commenced by the mortgagee, and he, before the sale, assigns the mortgage to another, and the assignee continues the advertisement in the name of the mortgagee, instead of commencing again.⁴ In regard to deeds of trust, the rule is that the trust cannot be delegated except in compliance with the terms of the trust deed. "A power is conferred upon the trustee, upon the happening of the contingency named, to sell the property; and to effectuate the object in view, he is clothed with the legal estate in the premises, for the purpose of passing it to the purchaser. The

¹ *Wells v. Wells*, 47 Barb. 416.

² *Bush v. Sherman*, 80 Ill. 160; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Harnickell v. Orndorff*, 35 Md. 341; *Cohoes Co. v. Goss*, 13 Barb. 137; *McGuire v. Van Pelt*, 55 Ala. 344; *Slee v. Manhattan Co.*, 1 Paige. 48; *Pickett v. Jones*, 63 Mo. 195; *Brown v. Delaney*, 22 Minn. 349. And see *Titley v. Wolstenholme*, 7 Beav. 425; *Bradford v. Belfield*, 2 Sim. 264; *Wilson v. Bennett*, 5 De Gex & S. 475; *Cooke v. Crawford*, 13 Sim. 91; *Townsend v. Wilson*, 1 Barn. & Ald. 608; *MacDonald v. Walker*, 14 Beav. 556. And see *Heath v. Hall*, 60 Ill. 344; *Dill v. Satterfield*, 34 Md. 52; *Vansant v. Allmon*, 23 Ill. 30; *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219; *Sargent v. Howe*, 21 Ill. 148; *Strother v. Law*, 54 Ill. 413.

³ *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562.

⁴ *Niles v. Ransford*, 1 Mich. 338; 51 Am. Dec. 95.

substantial part of the deed is the equitable interest in the property which is acquired by the *cestui que trust*, whilst the trustee is the mere instrument selected by the grantor to make the sale and transfer. Being, therefore, a mere instrument to execute the purpose of the grantor, he cannot delegate his power to another without express authority conferred by the deed itself.”¹ Accordingly, it is held that where two persons, or the survivor of them, and the heirs and assigns of the survivor, are clothed with a trust, it cannot be executed by a third person to whom the survivor had conveyed the property. The court held that the term “assigns” could not with certainty be declared to include a person who might be made such by the trustee during the latter’s life.²

§ 396. Sale by administrator of mortgagee.—Where a power of sale is conferred upon the mortgagee, his legal representatives or attorney, the right to collect the debt upon the death of the mortgagee passes to his administrator, and he, as the legal representative of the mortgagee, may sell and convey under the power.³ Two persons were partners, and one of them having died, the survivor was appointed his administrator. For the purpose of securing a debt to the firm, a debtor executed a mortgage, stating the consideration to have been paid by the survivor and the estate of the deceased partner, and a power of sale was conferred upon the mortgagees. It was held that the whole legal title was vested in the surviving partner, one-half to his own use, and the other half as administrator, and that a deed made by him under the power was not invalidated by an omission to describe himself as ad-

¹ *Whittelsey v. Hughes*, 39 Mo. 13, 20, per Flagg, J. And see *Mason v. Ainsworth*, 58 Ill. 163; *Cushman v. Stone*, 69 Ill. 516; *Flower v. Ellwood*, 66 Ill. 438; *Wilson v. Spring*, 64 Ill. 14.

² *Whittelsey v. Hughes*, 39 Mo. 13. And see *McKnight v. Wimer*, 38 Mo. 132; *Pickett v. Jones*, 63 Mo. 195.

³ *Merrin v. Lewis*, 90 Ill. 505; *Lewis v. Wells*, 50 Ala. 198; *Johnson v. Turner*, 7 Ohio, 568; *Berry v. Skinner*, 30 Md. 567; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; 8 Am. Dec. 467; *Collins v. Hopkins*, 7 Iowa, 463; *Averill v. Taylor*, 5 How. Pr. 476.

ministrator.¹ The general rule is that courts of one State do not recognize administrators or executors appointed in other States. But where a power of sale thus devolves upon an executor or administrator, he may execute it out of his State, as the exercise of the power is not a matter of jurisdiction, but of private contract between the parties.²

§ 397. Conveyance of part of the premises.—A mortgagee does not lose his right to sell under the power by a conveyance of a part of the premises.³ And a prior mortgagee has a right to sell under his power, notwithstanding that a subsequent encumbrancer has filed a bill to redeem, and the bill is still pending.⁴ The right to sell is not lost by the mortgagee's entry for foreclosure, and the taking of rents and profits, not sufficient to discharge the indebtedness.⁵ A sale may be made under a power in a trust deed, although the debt secured is barred by the statute of limitations.⁶

§ 398. Compliance with the conditions of the power. There must be a strict compliance with the essential terms of the power.⁷ "The statutory modes of transferring the title from a party to his real estate, and vesting it in another by way of tax sales, mortgage sales, and other remedies, are so numerous, and so facile of execution, that it is the duty of courts to require a strict compliance with the law in each case in every essential requirement."⁸ The sale may be private when the power does not provide

¹ *Look v. Kenney*, 128 Mass. 284. See *Jacobs v. McClintock*, 53 Tex. 72.

² *Doolittle v. Lewis*, 7 Johns. Ch. 45; 11 Am. Dec. 389.

³ *Wilson v. Troup*, 2 Cowen, 195; 14 Am. Dec. 458.

⁴ *Adams v. Scott*, 7 Week. Rep. 213. See *Rhodes v. Buckland*, 16 Beav. 212; *Benjamin v. Loughborough*, 31 Ark. 210.

⁵ *Montague v. Dawes*, 12 Allen, 397.

⁶ *Mott v. Maris* (Tex. Civ. App., Oct. 11, 1894), 29 S. W. Rep. 825.

⁷ *Low v. Purdy*, 2 Lans. 422; *Ormsby v. Tarascon*, 3 Litt. 404; *King v. Duntz*, 11 Barb. 191; *St. John v. Bumpstead*, 17 Barb. 100.

⁸ *Dana v. Farrington*, 4 Minn. 433, 437, per Flandrau, J.; *Gibson v. Jones*, 5 Leigh, 370; *Van Slyke v. Shelden*, 9 Barb. 273; *Cole v. Moffit*, 20 Barb. 18.

that it shall be public.¹ In some cases, from the language of the power, a prior entry may be necessary to enable the mortgagee to sell, or at least there must be a demand for possession and a refusal.² Where there are two mortgages with powers of sale upon the same piece of land, both mortgagees may unite in the sale.³ A power of sale may by a subsequent instrument be modified, and the time of its exercise postponed, but it is not thereby necessarily revoked, and a sale may be had under the original power.⁴

§ 399. What notice must be given.—Where the statute or the terms of the power do not provide that notice shall be given, none is necessary.⁵ The rule as to the giving of personal notice is, that, when the power of sale

¹ *Martin v. Paxson*, 66 Mo. 260, 266; *Mowry v. Sanborn*, 68 N. Y. 153, 160.

² *Roarty v. Mitchell*, 7 Gray, 243. See *Montague v. Dawes*, 12 Allen, 397; *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106.

³ *M'Carogher v. Whieldon*, 34 Beav. 107. And where an undivided half of a piece of land is conveyed by the same person by two trust deeds, to one trustee for the benefit of the same creditor, the trustee should sell under both deeds: *Coffman v. Scoville*, 86 Ill. 300. See *Tyler v. Massachusetts Mut. Life Ins. Co.*, 108 Ill. 58. Where a trustee fails to apply to a court of equity to remove impediments to the proper execution of the trust, any party injured by his default may apply: *Hartman v. Evans*, 30 W. Va. 669.

⁴ *Boyd v. Petrie*, Law R. 7 Ch. 385. The mortgagor must generally bear the expenses when the sale is abortive: *Sutton v. Rawlings*, 18 Law J. (N. S.) Ex. 249; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334. If the foreclosure is defective, and the mortgagee for any purpose of his own thinks it necessary to proceed to a new foreclosure for the correction of some error in his proceedings, he has no legal or equitable right to make his mortgagor bear the expense: *Clark v. Stilson*, 36 Mich. 482. See *Collar v. Harrison*, 30 Mich. 66. The right to the surplus after the sale passes to the grantee under a deed of the equity of redemption: *Buttrick v. Wentworth*, 6 Allen, 79; *Reid v. Mullins*, 43 Mo. 306; *Cook v. Basley*, 123 Mass. 396; *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69; *Foster v. Potter*, 37 Mo. 525. As to the person entitled to the surplus on the death of the mortgagor, see *Chaffee v. Franklin*, 11 R. I. 578; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; 19 Am. Rep. 293; *Sweezy v. Thayer*, 1 Duer, 286; *Shaw v. Hoadley*, 8 Blackf. 165; *Varnam v. Meserve*, 8 Allen, 158; *Allen v. Allen*, 12 R. I. 301; *Wright v. Rose*, 2 Sim. & St. 323.

⁵ *Davey v. Durant*, 1 De Gex & J. 535.

provides for a published notice, this is all that is required, unless an express agreement for personal notice is inserted. As said by Mr. Justice Sheldon: "The maker of the deed of trust knew that such a contingency was liable to occur at any time during a default of payment; and if he had wished personal notice of it to himself to be a condition precedent to the exercise of the power of sale, he should have so provided by his deed. To add to the power by implication, such a condition might wrongfully disappoint the expectation of the creditor. The creditor as well as the debtor had an interest in the execution of the power of sale. The terms and conditions upon which it should be exercised were arranged by their mutual agreement. According to the contract made by the parties, the creditor was not to be subjected to a longer delay than forty days before he could realize from the security any arrear of payment. To require a personal notice to the debtor, who, at the time, might be in distant or unknown parts, might create a very inconvenient delay in the collection of a claim evidently intended by the parties to be speedy; and the creditor might well have refused to accept a security trammelled with such a condition."¹ The fact that a person upon whom notice is served, when notice is required by the terms of the power, is insane, or under some disability, does not affect the sale, if the notice is given in the manner prescribed by the power.²

¹ *Princeton Loan & Trust Co. v. Munson*, 60 Ill. 371, 375; *Hurt v. Kelly*, 43 Mo. 238; *Dyer v. Shurtleff*, 112 Mass. 165; 17 Am. Rep. 77. But see *Capehart v. Biggs*, 77 N. C. 261; *Root v. Wheeler*, 12 Abb. Pr. 294. See *Cleaver v. Green*, 107 Ill. 67; *Woonsocket Savings Inst. v. American Worsted Co.*, 13 R. I. 255.

² *Tracy v. Lawrence*, 2 Drew. 403. As to voluntary promises on the part of the mortgagee not to sell without first giving notice to the mortgagor or the holder of the equity of redemption, see *Hall v. Oushman*, 14 N. H. 171; *Rutherford v. Williams*, 42 Mo. 18; *Randall v. Hazelton*, 12 Allen, 412; *Drinan v. Nichols*, 115 Mass. 353; *Clarkson v. Creely*, 40 Mo. 114. When other persons than the mortgagor are entitled to notice, he cannot waive notice for them: *Forster v. Hoggart*, 15 Q. B. 155. As to the presumption after the sale that the notice was sufficient, see *Burke v. Adair*, 23 W. Va. 139; *Dryden v. Stephens*, 19 W. Va. 1. When

§ 399 a. Personal notice to grantor or subsequent encumbrancers.—It is not necessary to notify a subsequent mortgagee of an intention to sell. "In the absence of fraud," said Mr. Justice Burgess, "or some undue advantage being taken, the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar, subsequent, or junior lien or encumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust. All that is required of him is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith. It will not do that suspicious circumstances may be connected with the sale, but proof of its unfairness, and that it was fraudulent, must be produced."¹ The trustee is not required to endeavor to procure bidders for the property to be sold, nor to give the grantor in the trust deed personal notice of the sale.²

§ 400. Publication of notice in newspaper.—If the instrument conferring the power does not name the newspaper in which the notice of sale is to be published, the selection of the newspaper for this purpose is left to the discretion of the trustee or mortgagee, with the general condition that he observe good faith.³ And he may, in the proper exercise of this discretion, publish the notice in a newspaper which is printed beyond the limits of the State in which the land lies, if the deed does not designate the place where publication is to be made, but allows it to rest in his discretion.⁴ The notice must not

equity takes charge of the sale, it may prescribe a longer period of notice than is required by the deed of trust: *Morris v. Virginia State Ins. Co.*, 90 Va. 370.

¹ *Hardwicke v. Hamilton*, 121 Mo. 465.

² *Harlin v. Nation*, 126 Mo. 97.

³ *Ingle v. Culbertson*, 43 Iowa, 265; *Thompson v. Heywood*, 129 Mass. 401. Where a trustee was authorized to advertise and sell, but instead of advertising executed a deed to the beneficiary on consideration of a sum credited on the debt, the deed was held to pass no title: *Heermans v. Montague* (Va. March 13, 1890), 20 S. E. Rep. 899.

⁴ *Ingle v. Jones*, 43 Iowa, 286.

be published before the occurrence of the default. If it is published before, the notice is void, and a sale under it cannot be sustained. A newspaper may be dated on Saturday, although it is delivered to carriers or mailed to subscribers on the day before, Friday. In this case the publication is made on Friday, and not on Saturday, because the publication is complete when the papers have left the control of the proprietor. When by the terms of the trust deed or mortgage, Friday is the last day for payment, the debtor is entitled to the whole of the business hours of that day in which to discharge the debt. A valid notice cannot be given before the default occurs, and if publication were made on Friday, the notice would be premature; nor would the case be altered by the fact that a small edition of the paper was not issued till Saturday, nor by the fact that the sale had subsequently been postponed for a week.¹ Where the deed of trust requires that the notice shall be published in two different places, the requirement must be fully complied with to make the sale operative, and the purchaser must take notice from the record of the requirements of the deed.²

§ 401. Extent of circulation.—It is not essential to sustain a sale to show the extent of the circulation of the paper which contained the notice of sale.³ But it is held that if the notice is published in a newspaper having no circulation in the town where the sale takes place, and no bidders, were present except in the mortgagee's interest, and the premises were purchased by the mortgagee for less than their value, the court will set

¹ *Pratt v. Tinkcom*, 21 Minn. 142.

² *Bigler v. Waller*, 14 Wall. 297; *Thornburg v. Jones*, 36 Mo. 514.

³ *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556. The court said: "It is objected that the newspaper was obscure and of limited circulation, and that the last publication should have been ten days before the sale. There is no proof in regard to the circulation or character of the paper. It appears to have been a newspaper, and neither the power nor the law requires proof of any specific notoriety or extent of circulation to make a valid medium for notice by publication."

aside the sale.¹ Where it is apparent that the mortgagee selected a small and obscure newspaper published in a remote part of the county for these reasons, and the mortgagor's interests have suffered by this selection, he may be permitted to redeem.² And it has been held that the publication may be made in a law and advertising journal whose circulation is limited.³ When a paper issues more than one edition in the same day, it is not requisite that the notice should appear in all the editions of the paper issued on those days on which publication of the notice was made.⁴ Where the trustee is required to give thirty days' notice of the time and place of sale, by advertising the same for three successive weeks in a newspaper, a publication for three successive weeks, when the first publication is made more than thirty days before the day of sale is sufficient.⁵

§ 402. **Time of publication.**—Where it is required that ten days' notice of the sale shall be given, the requirement is sufficiently complied with if the first publication of the notice is made not less than ten days prior to the sale; an intervention of ten days between the last insertion and the day of sale is not required.⁶ "The requirement of the power is not that the last notice shall be published ten days before sale, but simply that ten days' notice shall be given of the sale."⁷ A deed of trust provided that thirty days' notice of the sale should be given. The notice was published from March 12th to April 15th inclusive, on the secular days of the week. The court held that the Sunday omissions did not vitiate the sale.⁸

¹ *Briggs v. Briggs*, 135 Mass. 306.

² *Webber v. Curtiss*, 104 Ill. 309.

³ *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441.

⁴ *Everson v. Johnson*, 22 Hun, 115.

⁵ *Bell Silver and Copper M. Co. v. First National Bank of Butte*, 156 U. S. 470.

⁶ *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

⁷ *St. Joseph Mfg. Co. v. Daggett*, *supra*.

⁸ *Kellogg v. Carrico*, 47 Mo. 157. See, also, *Leffler v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672; *Taylor v. Reid*, 103 Ill. 349; *Johnson v. Dorsey*, 7 Gill. 269; *Atkinson v. Duffy*, 16 Minn. 45.

Where the power requires that the notice shall be published "once each week for three successive weeks," the publication need not be made so that the first advertisement shall be published three weeks before the time appointed for the sale.¹ A deed of trust provided that the trustee after default might sell the property, "after publishing a notice in a newspaper published in the city of Chicago, ten days" before the day of such sale. The notice was published in a daily paper for twelve days before the sale, excluding the latter day, in each paper issued during that time, but no paper was published on the intervening Mondays. The court held that sufficient notice had been given.² So where the power authorizes a sale when default occurs, upon giving notice of the time and place of sale "thirty days before the day of sale" one publication of the notice is sufficient.³ Where the power provides that a sale may be made after a notice of a

¹ *Dexter v. Shepard*, 117 Mass. 480; *Frothingham v. March*, 1 Mass. 400.

² *Weld v. Rees*, 48 Ill. 428. Mr. Justice Walker, in delivering the opinion of the court, said: "It will be observed that the language does not, in terms, require notice to be published by ten daily insertions, or a notice for ten days, the first insertion being ten days before the sale. If it had, then there might be some question as to the sufficiency of the notice. But the language is, 'after publishing a notice in a newspaper published in the city of Chicago, ten days before the day of such sale.' Had there been but one insertion, and that on the first day of the month, it would have been a notice in a newspaper published ten days before the 13th of the month. The language, in terms, does not require, nor does it import, that the publication shall be a continuous one. Had it been in the country, where but weekly papers are published, and this language had been used, as it usually is, no one could or would contend that the sale could not be made until the publisher had changed his paper from a weekly to a daily, and the notice inserted for ten successive days. In such a case an insertion in a weekly paper would answer the requirement. The language employed in this case would seem to have been employed to exclude the idea that the notice should be continuous, as it has no terms which would imply successive or continuous publications. It speaks of but one notice and one paper, and that ten days before the sale." But see *Scammon v. The City of Chicago*, 25 Ill. 424; 79 Am. Dec. 334.

³ *Jenkins v. Pierce*, 98 Ill. 646. See, also, *George v. Arthur*, 2 Hun, 406; *Tooke v. Newman*, 75 Ill. 215; *Howard v. Hatch*, 29 Barb. 297; *Cushman v. Stone*, 69 Ill. 516; *Worley v. Naylor*, 6 Minn. 192.

specified number of days, the sale is not limited to the day immediately following the expiration of the time specified in the power.¹

§ 403. A matter of contract.—In some States, the proceedings under a power of sale are regulated by statute. But in the absence of statutory regulation, the parties may contract as to the kind of notice, and when and how it shall be given, and their agreement will bind them.² The legislature has power to shorten the time theretofore required to be given of the sale, and a law of this character is not unconstitutional as to mortgages existing when it was passed, as it operates upon the remedy only and does not impair the obligation of the contract.³ Statutes of a State providing for the foreclosure of mortgages of real estate do not apply to those affecting land situated in another State.⁴ The power must be strictly complied with, and in the execution of the power the trustee or mortgagee must use the utmost fairness; but such strictness and literal compliance as would destroy the power will not be exacted.⁵ Where a trust deed au-

¹ *Beal v. Blair*, 33 Iowa, 318.

² *Martin v. Paxson*, 66 Mo. 260. See *Butterfield v. Farnham*, 19 Minn. 85; *Shellaber v. Farmers' Loan & Trust Co.*, 13 N. Y. 642.

³ *James v. Stull*, 9 Barb. 482.

⁴ *Elliott v. Wood*, 45 N. Y. 71; *Central Gold Mining Co. v. Platt*, 3 Daly, 263; *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y. 43.

⁵ *Waller v. Arnold*, 71 Ill. 350; *Meacham v. Steele*, 93 Ill. 135. See *Thompson v. Commissioners*, 79 N. Y. 54; *Hoffman v. Anthony*, 6 R. I. 282; 75 Am. Dec. 701; *Warehime v. Carroll Co. Build. Assn.*, 44 Md. 512; *Sherwood v. Reade*, 7 Hill, 431; *Lee v. Mason*, 10 Mich. 403; *Doyle v. Howard*, 16 Mich. 261; *Wood v. Lake*, 62 Ala. 489; *Hebert v. Bulte*, 42 Mich. 489. A sale takes away the right of redemption and prevents a levy of execution upon land by force of the attachment. The money realized from the sale will be applied, according to the rights of the parties, as they existed before the property was converted into money: *Douglass' Appeal*, 48 Pa. St. 223; *Astor v. Miller*, 2 Paige, 68; *Bartlett v. Gale*, 4 Paige, 503; *Fry's Appeal*, 76 Pa. St. 82; *Barber v. Cary*, 11 Barb. 549; *De Wolf v. Murphy*, 11 R. I. 630. When the equity of redemption is subject to a judgment lien, this must be satisfied before the owner of the equity is entitled to anything: *Eddy v. Smith*, 13 Wend. 488; *Hall v. Gould*, 79 Ill. 16.

thorizes a sale to be made upon thirty days' notice, a sale made upon a notice of twenty-six days only passes no title.¹

§ 404. **Publication by posting notices.** — Where a trust deed provides for the posting of notices a specified time before the sale, it is sufficient if they are put up early enough to remain for that time, and it is not requisite to insure the valid exercise of the power that they should have remained posted up during every day preceding the sale. "It was not the duty of the trustee," says Campbell, J., "to make daily and hourly observation at the three public places of the notices so as to insure their remaining posted. It is not true that the displacement of the posted notices by casualty or design would invalidate a sale under them, after they had been duly posted. The grantors in the deed of trust having prescribed notice by posting, must be held to have assumed the risk of the removal of some or all of the notices by accident or design. The trustee is the chosen agent of the grantor in a deed of trust, vested by him with the legal title to be by him conveyed to a purchaser at the sale to be made under the deed of trust; and when he has determined on a day of sale, and has posted the proper notices according to the deed of trust at the proper time, he may lawfully sell on the day designated, without regard to the fact that wind or rain, or some mischievous or evil-disposed person, may have removed one or all of the notices. Any other rule would invalidate most sales under deeds of trust which authorize a sale upon posted notices. It would place it in the power of mischievous or evil-minded persons to defeat every proposed sale under such deeds of trust. Any such rule is impracticable and impolitic. Titles would be so insecure under it as to forbid competition at such sales, and lead to the sacrifice of property."² The language used in the deed must receive a reasonable con-

¹ *Enochs v. Miller*, 60 Miss. 19.

² *Graham v. Fitts*, 53 Miss. 307, 313. See *Rice v. Brown*, 77 Ill. 549.

struction. On this ground the word "by" has been held to have been inserted by mistake for the word "or," where the provision was that notice might be given by publication in a newspaper "by posting up notices" in four places of the county.¹

§ 405. **Authority for the sale.**—The notice should show by whose authority the sale is to be made. A power of sale provided that notice should be given of the time and place of sale "once in each of three successive weeks in two daily newspapers printed in the county." The mortgage was assigned, and the published notice failed to name the holder of the then equity of redemption, or the assignee himself, but stated the names of the mortgagor and mortgagee, and referred to the book and page of the record, but was not signed by any one. The sale, on the essential ground that the notice was not signed, was held to be invalid.² In Michigan, it is held that if the mortgagor's name is not correctly given in the notice, a statutory foreclosure sale is invalid.³ A notice which was not signed by anyone, and did not give the name of the mortgagor or mortgagee, nor refer correctly to the page of the book in which the mortgage was recorded, nor give the name of the auctioneer who was to conduct the sale, has been decided to be fatally defective.⁴ But the validity of the notice is not affected by omitting to name subsequent mortgagees or the owners of the equity of redemption.⁵ "It is no part of the duty of the mortgagee to state in his notice the names of those who have acquired an interest in the estate from the mortgagor since the mortgagee's title accrued." ⁶

¹ *Watson v. Sherman*, 84 Ill. 263.

² *Roche v. Farnsworth*, 106 Mass. 509. But see *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64; 75 Am. Dec. 681.

³ *Lee v. Clary*, 38 Mich. 223.

⁴ *Hoffman v. Anthony*, 6 R. I. 282; 75 Am. Dec. 701. See, also, *Thompson v. Commissioners*, 79 N. Y. 54; *Bridenbecker v. Prescott*, 3 Hun, 419; *Candee v. Burke*, 1 Hun, 546.

⁵ *Learned v. Foster*, 117 Mass. 365.

⁶ *Dyer v. Shurtleff*, 112 Mass. 165, 170; 17 Am. Rep. 77.

§ 406. **Designation of place of sale.**—The place where the sale is to be made should be definitely specified. A notice of sale described the place of sale as “the courthouse in the city of St. Paul.” The court said that while the notice was “certainly more indefinite than is consistent with a due regard to the convenience of persons desiring to attend the sale, and with a proper consideration of the prejudice which might possibly result to the mortgagor and other parties interested in the mortgaged property, still, as it cannot be said that the notice does not specify a *place* of sale (notwithstanding the specification is somewhat indefinite), and as no fraud or unfairness, or actual or probable injury is shown, we are of opinion that the notice cannot be held insufficient to uphold the sale.”¹ A deed of trust provided that the sale should be made at the “courthouse door.” It was held that while the courthouse building was undergoing repair, a sale might be made at the door of a building which was in the meantime used as a courthouse, and such a sale would be upheld.² Where a trust deed provides that the sale shall take place at the courthouse of the county, and subsequently a new county is created, from a part of the old, and the new county contains the land described in the trust deed, the power is properly exercised by selling at the courthouse of the new county.³ If a deed of trust provides that a sale may be made at the north door of the courthouse, and the courthouse is subsequently destroyed, the sale, after such destruction, may be made on that portion of the ground that would have been in front of the courthouse door, had the build-

¹ *Golcher v. Brisbin*, 20 Minn. 453, 459, per Berry, J. So a notice stating the time and place of sale as, “at the front door of the courthouse, in the city of St. Paul, on Thursday, the tenth day of May, 1880,” was held sufficiently definite in these particulars.

² *Hambright v. Brockman*, 59 Mo. 52. If the sale is required to be made at the county seat of a certain county, and the county is subsequently divided, a sale had at the county seat of one of the new counties is invalid: *Durrell v. Farwell* (Tex. Civ. App. June 20, 1894), 27 S. W. Rep. 795.

³ *Williams v. Pouns*, 48 Tex. 141.

ing remained in the condition in which it was at the execution of the deed.¹ But a sale is void where the notice of sale specifies the place of sale as "the front door of the courthouse" in a certain town, and there is no courthouse there, nor any place known by that name.²

§ 407. **Designation of time of sale.**—The same rule applying to the designation of the place of sale, applies also to the time of sale. They both must be definitely specified.³ But a notice of sale which omitted the year, stating that it would take place on the "28th of December next," was held to be good.⁴ But where the year was mentioned and a mistake made, the sale being advertised to take place in February, 1858, though it was intended to be made, and in fact was made, in 1859, the notice was held to be fatally defective.⁵ If the day advertised for a sale falls upon Sunday, it does not follow for this reason that the proceedings are void.⁶ A notice of sale stated that it would be made on the 23d of May, but subsequently the date, without the debtor's knowledge, was changed to the 25th. He attended at the place designated at the time first stated, but the sale was not made until the latter day, and this sale the court decided void.⁷ In a notice of sale it was stated that the sale would occur on Friday, the 17th. It happened that Friday was the 16th, and the correction was made on that day, but the proceedings, nevertheless, were held to be void.⁸ In the absence of any provision in the deed of trust as to the time, place, or terms of sale, and if there is no statute pre-

¹ *Chandler v. White*, 84 Ill. 435; *Waller v. Arnold*, 71 Ill. 350. See *Alden v. Goldie*, 82 Ill. 581; *Gregory v. Clarke*, 75 Ill. 485; *Wilhelm v. Schmidt*, 84 Ill. 183; *Hornby v. Cramer*, 12 How. Pr. 490; *Rice v. Brown*, 77 Ill. 549.

² *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125.

³ *Burnet v. Denniston*, 6 Johns. Ch. 35.

⁴ *Gray v. Shaw*, 14 Mo. 341.

⁵ *Fenner v. Tucker*, 6 R. I. 551.

⁶ *Sayles v. Smith*, 12 Wend. 57; 27 Am. Dec. 117; *Westgate v. Handlin*, 7 How. Pr. 372.

⁷ *Dana v. Farrington*, 4 Minn. 433.

⁸ *Wellman v. Lawrence*, 15 Mass. 326.

scribing a specified mode of procedure, these matters are left to the discretion of the trustee, and the sale will be held valid if he fairly and honestly exercises that discretion.¹

§ 407 a. **Deed silent as to place of sale.**—If the trust deed is silent as to the place of sale,² it may be selected by the trustee, and either party not satisfied may apply to equity for instructions.³ The only question to be considered is whether the trustee, in such a case, exercised the discretion vested in him fairly and prudently.⁴ But where it is provided in a deed of trust that a sale should be made at the courthouse door, a sale is void which is made at the door of a building used by the commissioners' court and the county court, the commissioners, pursuant to the statute, having designated another place as the courthouse and place to hold court.⁵ Where a trustee is authorized to sell at the "front door of the courthouse," the courthouse having three front doors, it was decided, in an action to set aside the deed, that inasmuch as there was nothing in the deed to indicate that the door at which the sale was made was not the door contemplated, and the sale having been fairly made in a public manner, the sale should not be declared void because made at a different door.⁶

§ 408. **Erroneous statements.**—The notice should correctly state all matters of which it is the duty of the party selling under the power to give notice. But it is not necessary that it should be dated, as the date will be taken to be the time when publication is first made.⁷

¹ *Olcott v. Bynum*, 17 Wall. 44. Under the statute of Minnesota, an omission to designate the hour of sale does not necessarily make the sale invalid: *Menard v. Crowe*, 20 Minn. 448; *Butterfield v. Farnham*, 19 Minn. 85.

² *Morris v. Virginia State Ins. Co.*, 90 Va. 370.

³ *Shurtz v. Johnson*, 28 Gratt. 657.

⁴ *Miller v. Boone*, 86 Tex. 74.

⁵ *Martin v. Barth*, 4 Col. App. 646.

⁶ *Ramsey v. Merriam*, 6 Minn. 168.

Where there is no fraud, and the owner of the land has not been prejudiced, a sale will not be invalidated by the fact that the attorney's fee stipulated for in the mortgage has not been correctly stated.¹ It was stated in a notice that the property would be sold for cash, at the courthouse door in a certain town, but the county was not mentioned, nor was it stated that the sale would be at public vendue to the highest bidder. These omissions, however, were not considered as misleading.² But a statement that the property will be sold for default of three mortgages, when there are but two, the third affecting other land, is misleading, and will render the sale irregular and void.³ A recital, however, in general terms of a default is not subject to the objection of being misleading, because it fails to state that all the notes but one have been paid.⁴ Where the mortgagee acts in good faith, and it is usual and reasonable to require a deposit, a sale is not invalidated because a deposit was required, and this prevented a person from bidding.⁵ While the notice should show that a default has occurred within the terms of the mortgage,⁶ yet it has been held that this is not necessary, for the reason that the occurrence of the default is a necessary implication from the statement that the sale is made by virtue of the power.⁷ A mortgagor was not allowed to avoid a sale where the notice of sale fell on Sunday, and a new notice fixing a different day for the sale, and claiming a different amount as due, was given.⁸ When an adjournment of the sale is had to a future time, and the notice of it as published is for a different date, the sale cannot be upheld.⁹ It is not necessary to state the

¹ *Swenson v. Halberg*, 1 Fed. Rep. 444.

² *Powers v. Kueckoff*, 41 Mo. 425; 97 Am. Dec. 281.

³ *Burnett v. Denniston*, 5 Johns. Ch. 35.

⁴ *Bush v. Sherman*, 80 Ill. 160.

⁵ *Model Lodging House Assn. v. Boston*, 114 Mass. 133; *Pope v. Burrage*, 115 Mass. 282; *Goodale v. Wheeler*, 11 N. H. 424.

⁶ *Bush v. Sherman*, *supra*.

⁷ *Model Lodging House Assn. v. Boston*, *supra*.

⁸ *Banning v. Armstrong*, 7 Minn. 46.

⁹ *Miller v. Hull*, 4 Denio, 104. See, also, on this subject, *Hubbell v.*

amount due for the payment of which the sale is to be made, unless this is required by statute, or is one of the terms of the deed.¹ And when the statute does require the statement of this fact, it is sufficient to give the amount claimed to be due at some prior date, and that the mortgagee claims that sum with interest thereon from that date.²

§ 408 a. Sale under second deed erroneously referring to prior deed.—Where two trust deeds were executed by the same person for the same land, on the same day, and were both recorded in the same book of records, and the trustee attempted to sell under the second deed, but in his advertisement recited the wrong page of the record, so that apparently the sale was under the first deed, it was held that the trustees' deed, with knowledge of the facts, did not convey the legal title to the land, but merely an equity of redemption.³

§ 409. Description of the property.—The property to be sold under the power should be properly described. But if the street number of the building has been changed since the execution of the mortgage, a notice

Sibley, 50 N. Y. 468; *Chandler v. Cook*, 2 McAr. 176; *O'Connell v. Kelly*, 114 Mass. 97; *Alden v. Wilkins*, 117 Mass. 216; *Gray v. Shaw*, 14 Me. 341; *Pope v. Burrage*, *supra*; *Hornby v. Cramer*, 12 How. Pr. 490; *King v. Bronson*, 122 Mass. 122; *Fowle v. Merrill*, 10 Allen, 350; *Cook v. Basley*, 123 Mass. 396; *Donohue v. Chase*, 130 Mass. 137; *Morton v. Hill*, 118 Mass. 511.

¹ *Jenkins v. Pierce*, 98 Ill. 646.

² *Judd v. O'Brien*, 21 N. Y. 186. See, also, *Spencer v. Annon*, 4 Minn. 542; *Fairman v. Peck*, 87 Ill. 156; *Jencks v. Alexander*, 11 Paige, 619; *Bailey v. Merritt*, 7 Minn. 159; *Klock v. Cronkhite*, 1 Hill, 107; *Butterfield v. Farnham*, 19 Minn. 85; *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562; *Bennett v. Healey*, 6 Minn. 240; *Bailey v. Merritt*, 7 Minn. 159. The mortgagee may waive the proceedings, and advertise over again, or may resort to a foreclosure suit in equity, in case a mistake is made in the advertisement of such a character as would cause a sale to be irregular or voidable: *Atwater v. Kinnan*, Har. (Mich.) 243. For a case where a sale was set aside for erroneous statements contained in the notice, see *Wicks v. Wescott*, 59 Md. 270.

³ *Freeman v. Moffitt*, 119 Mo. 280.

describing the property as it is described in the mortgage is not defective, when it does not appear that the mortgagee had knowledge of the change, and when the mortgage does not give the number, it appearing only upon a plan referred to in the mortgage.¹ And the description of the property as "a certain lot of land, with the buildings and improvements thereon, situate in the northerly part of the city of Providence, being the lot of land numbered 10 (ten), on a plat of the land of Samuel Whelden, surveyed and platted by H. F. Walling, July 7, 1845," the plat being recorded, has been held sufficient.² Although the description may include the land sold, yet if it contains double the area of the property mortgaged, the sale will not be valid.³ In New York, under the statute, a notice was required to state the date of the mortgage, and where it was recorded. It was held that the place where the mortgage was recorded was sufficiently specified by mentioning the clerk's office and the date of record, though it erroneously stated the number of the book in which the mortgage was recorded.⁴ The notice sufficiently

¹ *Model Lodging House Assn. v. Boston*, 114 Mass. 133. A description of the property to be sold in the language of the mortgage is sufficient: *Bell Silver and Copper Min. Co. v. First Nat. Bank of Butte*, 156 U. S. 470. A power of sale is not exhausted by a sale which does not convey the title owing to a misdescription of the land in the advertisement and deed: *Lanier v. McIntosh*, 117 Mo. 508; 38 Am. St. Rep. 676.

² *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64; 75 Am. Dec. 681. In *Robinson v. Amateur Assn.*, 14 S. C. 148, it is said by McGowan, A. J.: "It is said again that the property was not sufficiently described to attract purchasers. It would seem to be a full answer to this that the advertisement described the premises in the identical terms by which they were described in the mortgage by the plaintiff himself, with the omission only of the words 'with the buildings thereon.' The land included whatever buildings were on it, and the words 'buildings thereon,' would have been mere surplusage, unless the omission was with a corrupt motive, which is not charged."

³ *Fenner v. Tucker*, 6 R. I. 551; *Hoffman v. Anthony*, 6 R. I. 282; 75 Am. Dec. 701.

⁴ *Judd v. O'Brien*, 21 N. Y. 186. Said Denio, J: "If there had been no reference to the number and page of the book, but only a statement of the time of recording in the proper clerk's office, I think there would have been a substantial compliance with the requirement of the statute.

describes the property, if it follows the description of the property by metes and bounds contained in the mortgage, and refers by book and page to the registry of deeds, and by book and page to a plan recorded in the office of the superintendent of public land.¹ The objection that the precise parcel to be sold is not designated, cannot be made to a notice which states that the premises will be sold, "or so much thereof as may be necessary." A notice of this kind is in the usual and proper form.²

§ 410. Sales to bona fide purchasers.—A *bona fide* purchaser is entitled to the same protection as if he had purchased at a sale under a decree of foreclosure.³ A purchaser without notice will obtain a good title when the record shows the mortgage to be valid.⁴ A *bona fide* pur-

Conveyances are required to be recorded in the order of time of delivery to the clerk for record: 1 Rev. Stats, 760, § 24. A person being thus informed of the place in the series of recorded mortgages, where the one of which he is in quest might be found, would never be at a loss in laying his hand on it. This would not be a sufficient answer if the act had required the volume and page to be stated; but it is not so precise in its requirements. The place where recorded would be sufficiently indicated by naming the office and the date of the record, and possibly by the mention of the office alone. But here is a positive error, and the question is whether it is one calculated to mislead; or rather, whether the notice, considering the error which entered into it, fails to accomplish the object intended by the statute. We think it does not. There being no book in the office of as high a number as the one mentioned, an inquirer would immediately recur to the other test of locality, the date, and could not fail immediately to find the record. The case is within the maxim *falsa demonstratio non nocet*."

¹ *Stickney v. Evans*, 127 Mass. 202. See, also, *Jackson v. Harris*, 3 Cowen, 241; *Hoffman v. Anthony*, 6 R. I. 282; 75 Am. Dec. 701; *Rathbone v. Clark*, 9 Abb. Pr. 66, n.; *Marsh v. Morton*, 75 Ill. 621; *Callaghan v. O'Brien*, 136 Mass. 378; *Colcord v. Bettinson*, 131 Mass. 233.

² *Snyder v. Hemmingway*, 47 Mich. 549.

³ *Slee v. Manhattan Co.*, 1 Paige, 48; *Jackson v. Henry*, 10 Johns. 185; 6 Am. Dec. 328. The title obtained at the sale is the equitable interest of the mortgagee, and if there be no redemption the legal title of the mortgagor, and the title then becomes as absolute as if the mortgage had at its date been a deed: *Hokanson v. Gunderson*, 54 Minn. 499; 40 Am. St. Rep. 354.

⁴ *Ledyard v. Chapin*, 6 Ind. 320; *Cameron v. Irwin*, 5 Hill, 272; *Wade v. Harper*, 3 Yerg. 383; *Warner v. Blakeman*, 36 Barb. 501; *Penny v. Cook*, 19 Iowa, 538.

chaser will be protected although the mortgage has been paid, when it is not discharged of record.¹ If an agreement is made between the owner of the land which has been sold under a deed of trust and the purchaser at the sale, that the latter will reconvey the premises to the

¹ *Merchant v. Woods*, 27 Minn. 396; *Warner v. Blakeman*, 36 Barb, 501. In the former case, the court, per Cornell, J., said: "The statutory provisions relating to recording conveyances of any estate or interest in real estate by which the title may be affected, are especially designed for the benefit and protection of parties dealing in that kind of property. The leading object is to provide full, truthful, and reliable information respecting titles, easily accessible to all, and upon which anyone may safely act in making a purchase when he has no knowledge or notice of any fact sufficient to put him upon inquiry, or to excite suspicion as to the fullness or accuracy of the record title: *Wade on Law of Notice*, § 96. To this end, every such conveyance by deed, mortgage, or otherwise, is required to be recorded in the office of the register of deeds of the county where the real estate is situated, and if not, it is declared to be void as against any subsequent purchaser of the same in good faith and for a valuable consideration, whose conveyance in whatever form is first duly recorded: *Gen. Stats. 1878, ch. 40, § 21*. Within the meaning of this section, a release by a mortgagee of his interest and estate in mortgaged premises, whether done by an entry on the margin of the record, by a certificate of discharge as authorized by section 36, or by a decree of court under section 37, is a conveyance, as that term is defined by section 26. Such was the ruling of this court in *Palmer v. Bates*, 22 Minn. 532, where it was also held that an unrecorded release of a portion of the mortgaged premises was of no avail as against an innocent purchaser for value, acquiring title under a statutory foreclosure by advertisement of the mortgage upon the entire tract, and a certificate of sale duly executed and recorded, with the usual affidavits of sale and publication of the foreclosure notice. In the case at bar, the foreclosure proceedings under which defendant claims title were had in strict conformity with the requirements of statute, and without objections from any source. The foreclosure notice was duly published, the mortgage was undischarged of record, and it and the note, for default in the payment of which the foreclosure was had, both purported upon their face to be unsatisfied, and were so held by the mortgagee at the time, of which facts the defendant had knowledge prior to his purchase. The certificate of sale and the affidavits of publication and sale were duly made and recorded, and it is not questioned that the defendant in entire good faith bought and paid a valuable consideration for the property, which was vacant and unoccupied at the time. In view of these facts it is difficult to distinguish the present case in principle from that decided in *Palmer v. Bates*, *supra*. The additional fact which exists in this case, but did not in that, that the whole mortgage debt was paid prior to the foreclosure, is only important as showing the extent of the relinquish-

former, when a debt due to such purchaser is discharged from the rents, and such purchaser subsequently conveys the property to another who has bought without notice of this agreement, paid a substantial part of the purchase money in cash, and given his negotiable promissory notes for the remainder, the agreement for a reconveyance cannot be enforced against such subsequent grantee.¹ But a purchaser cannot acquire a valid title when he is fully

ment of the mortgage security as between the parties thereto and their assigns; but it does not affect the question as to the effect of such relinquishment against third parties, having no notice thereof, actual or constructive. As between the former, such payment would operate to extinguish the entire mortgage, and all rights under it, and would equitably entitle the mortgagor or the holder of the equity of redemption to a deed of release from the mortgagee, releasing and relinquishing all his interest and rights under the mortgage. But no greater effect could be given to such a payment than would be accorded to a full deed of release, founded upon any valuable consideration, covering and relinquishing all the rights of the mortgagee under his mortgage. If such a release, unrecorded, would be ineffectual to defeat the title of an innocent purchaser without notice, acquired under a subsequent and apparently valid foreclosure of the mortgage, clearly a payment of the mortgage debt, unaccompanied by any written release whatever, would be equally ineffectual under like circumstances. The invalidity under the registry laws of such an unrecorded release as respects the rights of such a purchaser, follows as a logical sequence from the decision in *Palmer v. Bates*, *supra*. Though the release in that case only covered a part of the mortgaged premises, the decision was not put upon that ground, but upon the ground that the statute makes every unrecorded instrument of that character, without regard to the extent of the interest released, void as against any purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded. The principle, and the reason for it, is this: Whenever the lien of a recorded mortgage containing a power of sale is, in fact, discharged, in whole or in part, by payment or otherwise, the law makes it the duty of the mortgagor or the holder of the equity of redemption, as between him and third parties having no notice thereof, to procure the evidence of the discharge to be properly put upon record. A failure so to do leaves the mortgage apparently a subsisting security, and the mortgagee apparently still clothed with the authority originally conferred by the power; and if, in the exercise of such apparent authority, a foreclosure is regularly had, and a sale is effected upon the faith of the appearances, the innocent purchaser will be protected in his title, if first recorded, as against the party through whose fault and negligence the apparently valid foreclosure and sale were rendered possible."

¹ *Digby v. Jones*, 67 Mo. 104.

aware of any fraud or unfair dealing in the sale.¹ A purchaser under a deed of trust, who is also a beneficiary under it, is not made a trustee of the property by a remark casually made that he wished to purchase the property only for the purpose of securing his debt, and that when he was paid he intended to reconvey the property thus purchased.² It may be presumed from the lapse of time and acquiescence in the possession taken by the purchaser, that a sale under a power was regular, and that due notice, as required by the power, was given.³

§ 411. Sale should be beneficial to debtor.—It is the duty of the trustee under a deed of trust to cause the sale of the property to result as beneficially to the debtor as possible. The trustee should exercise a sound discretion, and when the land will sell as a whole for a larger price than it would bring if sold in parcels, he should pursue the former course.⁴ But if the property can readily be divided into lots, and will bring more by such division,

¹ *Mann v. Best*, 62 Mo. 491; *Jackson v. Crafts*, 18 Johns. 110. Although an owner might on account of irregularities have a sale set aside, still if he, with full knowledge of these irregularities, stands by and sees the purchaser sell the property to a third person without notice, and, interposing no objection, allows such third person to pay out his money, and expend money in improvements, the second purchaser will be protected against any claim by the former owner: *Jenkins v. Pierce*, 98 Ill. 646. See, also, *Hosmer v. Campbell*, 98 Ill. 572; *Jackson v. Dominick*, 14 Johns. 435; *Jackson v. Henry*, 10 Johns. 185; 6 Am. Dec. 328; *Elliott v. Wood*, 53 Barb. 285; *Hoit v. Russell*, 56 N. H. 559.

² *Mansur v. Willard*, 57 Mo. 347. Where there is no provision that the whole debt shall become due upon the payment of a part, and the property is sold to satisfy one installment before the others become due, any surplus remaining in the hands of the trustee is subject to the same lien to which the land was subject: *Standish v. Vosberg*, 27 Minn. 175; *Huffard v. Gottberg*, 54 Mo. 271; *Fowler v. Johnson*, 26 Minn. 338. And see *Beard v. Fitzgerald*, 105 Mass. 134; *Princeton Loan & Trust Co. v. Munson*, 60 Ill. 371; *Fielder v. Varner*, 45 Ala. 429; *Heath v. Hall*, 60 Ill. 344; *Shermer v. Merrill*, 33 Mich. 284; *Koester v. Burke*, 81 Ill. 436; *Flower v. Ellwood*, 66 Ill. 438; *Herrington v. McCollum*, 73 Ill. 476; *Stoevers v. Stoevers*, 9 Serg. & R. 434; *Bailey v. Merritt*, 7 Minn. 159; *Russell v. Duffon*, 4 Lans. 399.

³ *Simson v. Eckstein*, 22 Cal. 580.

⁴ *Singleton v. Scott*, 11 Iowa, 589; *Carter v. Abshire*, 48 Mo. 300; *Terry v. Fitzgerald*, 32 Gratt. 843.

or if the debt will be satisfied by a sale of a part of the property, the trustee should be guided by these considerations, and if he fails to do so, the party injured may have the sale set aside.¹ But still it remains generally true that a mortgagee is not compelled to sell in parcels for the purpose of obtaining a better price.² But it is to be remembered that where a trustee is authorized to sell the premises without division, or in parcels, as he should think best, his discretion in this respect is not arbitrary, and a sale in gross will be set aside when it is clearly manifest that a better price would have been obtained if the land had been sold in parcels.³ Where a statute requires a sale of the property in parcels, and anyone having an interest in the equity of redemption asks for a sale in parcels, and offers in good faith, for a part of the property that may conveniently be sold separately, an amount sufficient to pay the mortgage debt and expenses, the mortgagee is not justified in selling the entire property in one lot.⁴ It is usual to insert in a mortgage a clause that upon default in the payment of interest or any installment of the principal, the whole of the debt shall become due and payable. But it seems that even when a clause of this nature is not inserted, the whole mortgaged estate may, upon default in the payment of an installment of interest or principal, be sold, if the whole would be greatly impaired by the sale of a part.⁵ In order to set a

¹ *Tatum v. Holliday*, 59 Mo. 422; *Olcott v. Bynum*, 17 Wall. 44; *Taylor's Heirs v. Elliott*, 32 Mo. 172; *Gray v. Shaw*, 14 Mo. 341; *Goode v. Comfort*, 39 Mo. 313.

² *Adams v. Scott*, 7 Week. Rep. 213. See *Charter v. Stevens*, 3 Denio, 33; 45 Am. Dec. 444; *Grover v. Fox*, 36 Mich. 461; *Rowley v. Brown*, 1 Binn. 61; *Kline v. Vogel*, 11 Mo. App. 211; *Chesley v. Chesley*, 49 Mo. 540; *Samrall v. Chaffin*, 48 Mo. 402; *Clark v. Stillson*, 36 Mich. 482; *German Bank v. Stumpf*, 73 Mo. 311; *Larzelere v. Starkweather*, 38 Mich. 96.

³ *Cassidy v. Cook*, 99 Ill. 385.

⁴ *Ellsworth v. Lockwood*, 42 N.Y. 89. See, also, *Slater v. Maxwell*, 6 Wall. 268; *Wells v. Wells*, 47 Barb. 416; *Griswold v. Fowler*, 24 Barb. 135; *Lalor v. McCarthy*, 24 Minn. 417.

⁵ *Olcott v. Bynum*, 17 Wall. 44; *Salmon v. Clagett*, 3 Bland, 125; *Pole v. Durant*, 26 Iowa, 233; *Cox v. Wheeler*, 7 Paige, 248; *Barber v. Cary*,

sale aside because the property was not sold in parcels, it must appear that the rights of the debtor were sacrificed, or that there was fraud or unfairness.¹ Where a trustee agreed at the sale with the owner of the equity to postpone the sale for one hour, until the latter could give the trustee a certified check sufficient to pay the whole encumbrance, but the trustee, instead of waiting, sold the land within the hour for less than that sum, it was held that the sale should be annulled for fraud.²

§ 412. *Sale for cash.*—When the mortgagee has the power to sell for cash or on credit, in his discretion, he must exercise this discretion, not for his own interest merely, but for the benefit of all concerned.³ Nobody can object if the mortgagee in making the sale takes the risk of the payment of the purchase money upon himself, for this course enables him to make a better sale, and he may give credit for so much as would come to him, notwithstanding that the deed provides a sale for cash.⁴ The sale may be for cash, when the terms of sale are not provided for by the power.⁵ Substantial compliance with the requirement that a sale shall be for cash is all that is requisite, and a sale cannot be objected to, if the mort-

11 Barb. 549; *McLean v. Presley*, 56 Ala. 211; *Wilmer v. Atlanta & Richmond Air Line R. R. Co.*, 2 Woods, 447; *Fowler v. Johnson*, 26 Minn. 338; *Johnson v. Williams*, 4 Minn. 260; *Standish v. Vosberg*, 27 Minn. 175; *Bunce v. Reed*, 16 Barb. 347.

¹ *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Benkendorf v. Vincenz*, 52 Mo. 441; *Shine v. Hill*, 23 Iowa, 264; *Ingle v. Jones*, 43 Iowa, 286; *Chesley v. Chesley*, 54 Mo. 347; *Fairman v. Peck*, 87 Ill. 156.

² *Ventres v. Cobb*, 105 Ill. 33.

³ *Markey v. Langley*, 92 U. S. 142. Where the mortgagee is authorized to sell only for cash, and he accepts notes from the purchaser, if the notes subsequently become worthless he is liable to the mortgagor for the amount over that due him: *Tompkins v. Drennen*, 56 Fed. Rep. 694; 6 C. C. A. 83.

⁴ *Strother v. Law*, 54 Ill. 413; *Crenshaw v. Seigfried*, 24 Gratt. 272; *Bailey v. Aetna Ins. Co.*, 10 Allen, 286; *Parker v. Banks*, 79 N. C. 480; *Davey v. Durrant*, 1 De Gex & J. 535. See *Cox v. Wheeler*, 7 Paige, 248; *Thurlow v. Mackeson*, Law R. 4 Q. B. 97; *Muhlig v. Fiske*, 131 Mass. 110; *Stanford v. Andrews*, 12 Heisk. 664; *Powell v. Hopkins*, 38 Md. 1.

⁵ *Olcott v. Bynum*, 17 Wall. 44.

gagor has not been injured, when there has not been a literal compliance with such requirement.¹ Thus, under a power to sell "for cash" a sale is valid if made to one who gives his check for the price bid, which would have been paid if presented for payment.² A defect in the conduct of the sale may be cured by the mortgagor's acquiescence.³

§ 413. Trustee's presence at sale.—A special confidence is reposed in the trustee as to all duties which are not mechanical or ministerial;⁴ and hence, he should be personally present at the sale, and a sale may be vitiated by the fact of his absence.⁵ But where there are two trustees, and either has power to sell on default, if both join in the preliminary proceedings, it is sufficient if the sale be attended by but one.⁶ But if the trustee is present at the sale and controls it, he may, if he desires, employ

¹ *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69. See *Wood v. Krebs*, 33 Gratt. 685; *Johnson v. Watson*, 87 Ill. 535; *Fall River Savings Bank v. Sullivan*, 131 Mass. 537.

² *McConneaughey v. Bogardus*, 106 Ill. 321.

³ *Markey v. Langley*, 92 U. S. 142; *Olcott v. Bynum*, 17 Wall. 44; *Taylor v. Chowning*, 3 Leigh, 654. But see *Sloan v. Frothingham*, 65 Ala. 593. Suits may be brought by different claimants of the surplus money to determine their respective rights, against the mortgagee for money had and received: *Cope v. Wheeler*, 41 N. Y. 303; *Webster v. Singley*, 53 Ala. 208; 25 Am. Rep. 609; *Matthews v. Duryee*, 45 Barb. 69; *Cook v. Basley*, 123 Mass. 396; *Bevier v. Schoonmaker*, 29 How. Pr. 411. Or by a bill of interpleader he may bring the claimants into court: *Bevier v. Schoonmaker*, *supra*; *Bleeker v. Graham*, 2 Edw. Ch. 647; *People v. Ulster Com. Pleas*, 18 Wend. 628. A *cestui que trust* who bids more than sufficient to pay the debt, is legally bound for the balance of his bid, and after his death the claim may be enforced against his personal representatives: *Laughlin v. Heer*, 89 Ill. 119. And see *Skilton v. Roberts*, 129 Mass. 306; *Andrews v. Fiske*, 101 Mass. 422; *O'Connell v. Kelly*, 114 Mass. 97; *Morton v. Hall*, 118 Mass. 511; *Story v. Hamilton*, 20 Hun, 133; *Mathison v. Clark*, 25 Law J. Ch., N. S., 29; *Alden v. Wilkins*, 117 Mass. 216; *Winslow v. McCall*, 32 Barb. 241.

⁴ *Bales v. Perry*, 51 Mo. 449.

⁵ *Landrum v. Union Bank of Mo.*, 63 Mo. 48; *Grover v. Hale*, 107 Ill. 638; *Brickenkamp v. Rees*, 69 Mo. 426; *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542; *Graham v. King*, 50 Mo. 22; 11 Am. Rep. 401; *Vail v. Jacobs*, 62 Mo. 130; *Morris v. Virginia State Ins. Co.*, 90 Va. 370.

⁶ *Weld v. Rees*, 48 Ill. 428.

an auctioneer to effect the sale.¹ But in respect to a mortgagee, it is not essential that he should be personally present, but he may appoint an attorney to conduct the sale, and he ratifies his acts by the subsequent execution of the deed.² If, by the terms of the trust deed, the trustee is entitled to commission and expenses, he is entitled to his commission and to reasonable counsel fees necessarily paid by him in execution of the trust after advertisement of the property for sale, caused by the debtor's default, although a junior lienholder pays the debt and the sale is not actually made.³

§ 414. Power to adjourn sale.—If a sale is open and fair, and the terms of the power have been complied with, the mortgagee or trustee has performed his duty, and the objection cannot be made that a larger price might have been secured by a postponement.⁴ But the mortgagee has power, if he exercises his discretion reasonably, to postpone the sale to some future time.⁵ If no bidders are present the sale should be adjourned, and if, in such a case, the auctioneer bids off the property for the mortgagee the sale is void.⁶ It is not necessary that the notice of the adjournment should be as full and specific as the

¹ *Kennedy v. Dunn*, 58 Cal. 339; *Taylor v. Hopkins*, 40 Ill. 442; *McPherson v. Sanborn*, 88 Ill. 150. The failure of the trustee to indorse on the note the amount bid by the payee, is immaterial: *Riggs v. Owen*, 120 Mo. 176.

² *McHany v. Schenck*, 88 Ill. 357; *Fogarty v. Sawyer*, 23 Cal. 570; *Munn v. Burges*, 70 Ill. 604; *Parker v. Banks*, 79 N. C. 480. See *Palmer v. Hendrie*, 28 Beav. 341; *Watson v. Sherman*, 84 Ill. 263; *Hoit v. Russell*, 56 N. H. 559; *Yourt v. Hopkins*, 24 Ill. 326; *Hubbard v. Jarrell*, 23 Md. 66; *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106.

³ *Cannon v. McCape*, 114 N. C. 580.

⁴ *Franklin v. Greene*, 2 Allen, 519; *Davey v. Durant*, 1 De Gex & J. 535.

⁵ *Richards v. Holmes*, 18 How. 143; *Tinkorn v. Purdy*, 5 Johns, 345; *Hosmer v. Sargent*, 8 Allen, 97; 85 Am. Dec. 683; *Warren v. Leland*, 9 Mass. 265.

⁶ *Campbell v. Swan*, 48 Barb. 109. See *Thompson v. Heywood*, 129 Mass. 401; *Vail v. Jacobs*, 62 Mo. 130; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Johnston v. Eason*, 3 Ired. Eq. 336.

original.¹ The general rule, in case of an adjournment, is that it is not necessary to publish a new notice for the same length of time that the original was published.² In Illinois, however, it was held that when a trustee adjourns a sale, a new notice for the same time as originally required must be given.³ A sale will be void, if made before the time fixed in the notice of adjournment.⁴ It is usual to allow a purchaser a certain time to examine the title, and time, in this case, is not generally regarded as being of the essence of the contract.⁵

§ 415. **Release of parcel from mortgage.**—If a parcel of land covered by a mortgage is released from the operation of the mortgage, the right to sell the rest of the mortgaged premises under a power of sale is not affected by such release.⁶ And, where the land has, after the execution of the mortgage, been subdivided by the mortgagor into parcels, without the mortgagee's concurrence, and the parties have joined in obtaining the release of a parcel, the rest being left in distinct parcels, the sale is not void if made in parcels.⁷

§ 416. **Requirement of deposit.**—The trustee has the power to require a reasonable deposit at the time of the sale, and, if the deposit required is not unreasonably large, and the purchaser has not the money to make the deposit, and does not ask for a delay, the property may be put up for sale again.⁸ But a sale will not be upheld if, against the remonstrance of the persons who attend the sale, the

¹ *Dexter v. Shepard*, 117 Mass. 480.

² *Bennett v. Brundage*, 8 Minn. 432; *Jackson v. Clark*, 7 Johns. 217; *Westgate v. Handlin*, 7 How. Pr. 372; *Dana v. Farrington*, 4 Minn. 433; *Sayles v. Smith*, 12 Wend. 57; 27 Am. Dec. 117. See *Allen v. Cole*, 9 N. J. Eq. (1 Stockt.) 286; 59 Am. Dec. 416; *Hosmer v. Sargent*, 8 Allen, 97; 85 Am. Dec. 683; *Stearns v. Welsh*, 7 Hun, 676.

³ *Thornton v. Boyden*, 31 Ill. 200; *Griffin v. Marine Co. of Chicago*, 52 Ill. 180.

⁴ *Miller v. Hull*, 4 Denio, 104.

⁵ *Durm v. Fish*, 46 Mich. 312.

⁶ *Hobson v. Bell*, 2 Beav. 17.

⁷ *Durm v. Fish*, *supra*.

⁸ *Wing v. Hayford*, 124 Mass. 249.

whole amount of the purchase money is required to be paid at the time of the sale, or within an hour thereafter.¹

§ 417. **Right of mortgagee to purchase.**—The general rule is, that unless the instrument confers the power of purchasing upon the mortgagee, he is not allowed to become a purchaser at his own sale, the law, in the absence of a special stipulation, not permitting him to occupy the position of vendor and vendee at the same time. "In such a sale there is every temptation to promote his own interest at the sacrifice of that of the owner. The law will neither subject nor suffer him to be tempted to act unjustly. It is believed to be a rule of universal application, that the officer or person charged with the sale of property at auction, whether by authority of law or under a power derived from the owner, is prohibited from becoming the purchaser. If sanctioned, it would lead to oppression, wrong, and fraud, highly injurious to the owner. When such a purchase has been made, it is not necessary to show that wrong has resulted, as the law will not recognize such a bidder as capable of becoming a purchaser."² Where the mortgagee thus becomes the purchaser, the equity of redemption in favor of the mortgagor still attaches to the property.³ A trustee under a deed of trust

¹ *Goldsmith v. Osborne*, 1 Edw. Ch. 560. See *Horsev v. Hough*, 38 Md. 130; *Maryland L. & B. S. v. Smith*, 41 Md. 516.

² *Mapps v. Sharpe*, 32 Ill. 13, 22, per Walker, J; *Watson v. Sherman*, 84 Ill. 263; *Phares v. Barbour*, 49 Ill. 370; *Waite v. Dennison*, 51 Ill. 319; *Ross v. Demoss*, 45 Ill. 447; *Whitehead v. Hellen*, 76 N. C. 99; *Howard v. Ames*, 3 Met. 308; *McLean v. Presley*, 56 Ala. 211; *Lockett v. Hill*, 1 Woods, 552; *Roberts v. Fleming*, 53 Ill. 196; *Griffin v. Marine Co. of Chicago*, 52 Ill. 130; *Michoud v. Girod*, 4 How. 503; *Robinson v. Amateur Assn.*, 14 S. C. 148; *Parmenter v. Walker*, 9 R. I. 225; *Benham v. Rowe*, 2 Cal. 387; 56 Am. Dec. 342; *Kornegay v. Spicer*, 76 N. C. 95; *Hyndman v. Hyndman*, 19 Vt. 9; 46 Am. Dec. 171; *Downes v. Grazebrook*, 3 Mer. 200; *Rutherford v. Williams*, 42 Mo. 18; *Korns v. Shaffer*, 27 Md. 83. But see *Dawkins v. Patterson*, 87 N. C. 384; *Mills v. Williams*, 16 S. C. 593.

³ *Benham v. Rowe*, 2 Cal. 387; 59 Am. Dec. 342. Where the mortgagee becomes the purchaser, a subsequent sale by him, purporting to be made

labors under the same disability as a mortgagee, as to his power to purchase at his own sale.¹ It is held in Texas that if the sale is conducted fairly, the mortgagee may become a purchaser at his own sale under a power.² And in New York it is held likewise.³ When a sale is made to the mortgagee, the mortgage debt is extinguished to the extent of the bid.⁴ A second mortgagee may buy at a sale under a power contained in a prior mortgage.⁵ The wife of the mortgagor has the right of purchasing at a sale under the power;⁶ and so has the mortgagor himself.⁷

§ 418. **Sale voidable only.**—Such a sale is not void but voidable only.⁸ “The sale, if otherwise regular, is void-

under the same power, has no more force than a private sale: *Lovelace v. Hutchinson* (Ala., April 26, 1895), 17 So. Rep. 623.

¹ *Stephen v. Beal*, 22 Wall. 329; *Lass v. Sternberg*, 50 Mo. 124. Where, in compliance with the statute, a sale is made in good faith by the sheriff, the mortgagee may purchase under a power running to himself: *Ramsey v. Merriam*, 6 Minn. 168. But he has not this privilege if his own agent is the auctioneer, and makes the certificate and affidavit: *Allen v. Chatfield*, 8 Minn. 435.

² *Connelly v. Hammond*, 51 Tex. 635; *Howards v. Davis*, 6 Tex. 174. See *Marsh v. Hubbard*, 50 Tex. 203.

³ *Bergen v. Bennett*, 1 Caines Cas. 1; 2 Am. Dec. 81; *Elliott v. Wood*, 53 Barb. 285; *Hubbell v. Sibley*, 5 Lans. 51. This power is now expressly conferred by statute in that State: 3 Rev. Stats. (6th ed.) 847, § 7. See, also, *Bloom v. Van Rensselaer*, 15 Ill. 503; *Richards v. Holmes*, 18 How. 143; *Nat. Fire Ins. Co. v. Loomis*, 11 Paige, 431.

⁴ *Harris v. Miller*, 71 Ala. 26.

⁵ *Parkinson v. Hanbury*, 2 De Gex, J. & S. 450; *Shaw v. Bunny*, 33 Beav. 494; *Kirkwood v. Thompson*, 2 Hem. & M. 392. But see *Taylor v. Heggie*, 83 N. C. 244; *Bell v. Webb*, 2 Gill, 163; *Boyd v. Hawkins*, 2 Ired. Eq. 304; *Van Epps v. Van Epps*, 9 Paige, 237.

⁶ *Gantz v. Toles*, 40 Mich. 725; *Field v. Gooding*, 106 Mass. 310.

⁷ *Otter v. Vaux*, 6 De Gex, M. & G. 638. If the sale is made under the order of a court of bankruptcy, providing that the mortgage debt shall be paid out of the proceeds, and permitting the mortgagee to buy at the sale, the costs and expenses of the sale are properly payable out of the proceeds of the sale, without touching the other assets of the bankrupt, although the proceeds may not be sufficient to pay the debt: *In re Ellerhurst*, 2 Saw. 219.

⁸ *Gibbons v. Hoag*, 95 Ill. 45; *Blockley v. Fowler*, 21 Cal. 326; 82 Am. Dec. 747; *Patten v. Pearson*, 57 Me. 428; *Connolly v. Hammond*, 51 Tex. 635; *Burns v. Thayer*, 115 Mass. 89; *Jenkins v. Pierce*, 98 Ill. 646; *Mulvey v. Gibbons*, 87 Ill. 367.

able only at the election of the party whose interests are prejudiced thereby. It is not absolutely void. The title passes. The party injured may defeat and avoid it. But if, before he exercises that right, the estate has been conveyed to another, who has purchased in good faith, upon adequate consideration and without notice, such purchaser will hold the estate."¹ Such a sale is, of course, sufficient to enable the purchaser to maintain an action of ejectment.² But in North Carolina, it is held that the title does not pass by such a sale.³ If the property has been sold to another with a prior understanding that the purchaser should reconvey to the mortgagee, this is attempting to do indirectly what the law prohibits when done directly, and hence the mortgagee will acquire a title that may be avoided.⁴ But the mortgagee may purchase the property of one who has bought it in good faith, without any prior secret agreement for a sale to the mortgagee.⁵ A sale to the mortgagee, when not permitted by the mortgage, may be set aside by the mortgagor, or by anyone interested under him, if action is not unreasonably delayed.⁶ When a mortgagee becomes the purchaser, the sale may be set aside without showing any fraud or unfairness.⁷ And the disability of purchasing applies also to an agent or a solicitor of the mortgagee.⁸

¹ *Burns v. Thayer*, 115 Mass. 89, 93.

² *Hawkins v. Hudson*, 45 Ala. 482.

³ *Whitehead v. Hellen*, 76 N. C. 99.

⁴ *Munn v. Burges*, 70 Ill. 604; *Hoit v. Russell*, 56 N. H. 559; *Bush v. Sherman*, 80 Ill. 160.

⁵ *Watson v. Sherman*, 84 Ill. 263.

⁶ *Farrar v. Payne*, 73 Ill. 82; *Joyner v. Farmer*, 78 N. C. 196; *Munn v. Burges*, 70 Ill. 604; *Allen v. Ranson*, 44 Mo. 263; 100 Am. Dec. 282; *Johnson v. Watson*, 87 Ill. 535; *McLean v. Presley*, 56 Ala. 211; *Thornton v. Irwin*, 43 Mo. 153. See, also, *Goldsmith v. Osborne*, 1 Edw. Ch. 560; *Withall v. Rives*, 34 Ala. 91; *Harrison v. Roberts*, 6 Fla. 711.

⁷ *Blockley v. Fowler*, 21 Cal. 326; 82 Am. Dec. 747; *Thornton v. Irvin*, 43 Mo. 153; *Hoit v. Russell*, 56 N. H. 559.

⁸ *Orme v. Wright*, 3 Jur. 19; *Ex parte James*, 8 Ves. 337. See, also, *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192; *Fox v. Mackreth*, 2 Bro. C. C. 400; *Campbell v. Swan*, 48 Barb. 109. And see *Dexter v. Shepard*, 117 Mass. 480.

If a *bona fide* purchaser acquires the title from the mortgagee, it will be valid in his hands.¹

§ 419. **Waiver.**—The right to avoid the sale must be exercised within a reasonable time, or the courts will consider the right as waived.² The mortgage deed may, of course, provide that the mortgagee may purchase at the sale under the power, and in such a case there must be some circumstance which would invalidate the sale, if the purchase was made by anyone else, to cause the court to interfere.³

§ 420. **Mortgagee may execute a deed to himself.**—When the mortgagee has the power to purchase at a sale, and does become the purchaser, he has the power to execute a deed to himself which will convey the title.⁴ Although at one time it was intimated that this could not be done, and that the deed must be made to a third person,⁵ yet no objection can be found to this course, and indeed it is difficult to see how a mortgagee could effectuate his purchase unless he possessed the power of executing a deed to consummate the sale.

§ 421. **By whom the deed should be made.**—The deed should be made by the person who possesses the legal title. Hence, if an administrator has no power to take a mortgage in that capacity, the deed, upon a sale

¹ Benham v. Rowe, 2 Cal. 387; 56 Am. Dec. 342; Blockley v. Fowler, 21 Cal. 326; 82 Am. Dec. 747; Niles v. Ransford, 1 Mich. 338; 51 Am. Dec. 95; Rutherford v. Williams, 42 Mo. 18; Dexter v. Shepard, 117 Mass. 480; Robinson v. Cullom, 41 Ala. 693; Burns v. Thayer, 115 Mass. 89.

² Taylor v. Heggie, 83 N. C. 244; Joyner v. Farmer, 78 N. C. 196; Nichols v. Baxter, 5 R. I. 491; Munn v. Burges, 70 Ill. 604; Learned v. Foster, 117 Mass. 365.

³ Montgomery v. Dawes, 12 Allen, 397; Elliott v. Wood, 45 N. Y. 71.

⁴ Hall v. Bliss, 118 Mass. 554; 19 Am. Rep. 476. Where the mortgagee becomes the purchaser at a sale under the power, he has both the legal and equitable title, although no conveyance may have been made, and can recover possession, no step having been taken by the mortgagor to redeem: Hambrick v. New England Mortgage Security Co., 100 Ala. 551.

⁵ Dexter v. Shepard, 117 Mass. 480; Jackson v. Colden, 4 Cowen, 266.

by him under the power, should be made by him in his own right.¹ As a general rule, the title is not vested in the purchaser until the execution of the deed. It remains unaffected by the sale until the deed is executed.² If the power is given also to the assigns of the mortgagee, the assignee in case of an assignment should execute the deed.³ And in case of the death of the mortgagee, the power may be executed by his executor or administrator.⁴ When a deed is authorized to be executed in the name of the mortgagor, by the donee of the power, it should be made in this manner.⁵ If a married woman be the mortgagee, she may execute the power of sale in her own name, without the concurrence of her husband.⁶ But one sale and deed can be made by a trustee; a second deed passes no title.⁷ The title that the purchaser obtains is divested of all encumbrances created since the execution of the power.⁸ A purchaser is bound to take notice of the title with all the defects that the records disclose.⁹ He takes the equity of redemption of the mortgagor and all the title that the mortgagee possesses by virtue of his mortgage.¹⁰ But an independent title acquired by the mortgagee, or a right that he reserved in originally conveying the mortgaged premises to the mortgagor, before the execution of a mortgage to secure the purchase money, does not pass by the sale.¹¹ If there has been any irregularity

¹ *Wilkerson v. Allen*, 67 Mo. 502.

² *Tripp v. Ide*, 3 R. I. 51.

³ *Heath v. Hall*, 60 Ill. 344.

⁴ *Saloway v. Strawbridge*, 7 De Gex, M. & G. 594.

⁵ *Speer v. Hadduck*, 31 Ill. 439. If a deed, in a case of this kind, be made in the name of the mortgagee, although it may not convey a title in fee simple in law, an equitable title will pass by it to the grantee: *Mulvey v. Gibbons*, 87 Ill. 367. See *Gibbons v. Hoag*, 95 Ill. 45.

⁶ *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106.

⁷ *Koester v. Burke*, 81 Ill. 436.

⁸ *Sims v. Field*, 66 Mo. 111; *Doolittle v. Lewis*, 7 Johns. Ch. 45; 11 Am. Dec. 389; *Bancroft v. Ashhurst*, 2 Grant Cas. 513.

⁹ *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 416.

¹⁰ *Torrey v. Cook*, 116 Mass. 163; *Hall v. Bliss*, 118 Mass. 554; 19 Am. Rep. 476; *Brown v. Smith*, 116 Mass. 108.

¹¹ *Walsh v. Macomber*, 119 Mass. 73. See *Skilton v. Roberts*, 129 Mass. 306.

in the sale, and the sale for this reason is declared void, a purchaser who has paid the purchase money succeeds to the rights of the mortgagee, and the sale, although invalid, operates as an assignment of the mortgage.¹ A party who purchases under an invalid sale, is entitled to compensation for any improvements which he has made, after entering into possession.² The attorney for the beneficiary is competent to act as trustee where the deed of trust authorized any attorney residing in the State to act, that the beneficiary might appoint in writing in case the trustees named in the deed of trust should refuse to act.³

§ 422. **Deed to a person other than purchaser.**—If the purchaser requests that the deed be made to some other person than himself, the trustee can execute the deed to such person. "It is often the case," says Mr. Justice Breese, "a bidder at a public sale like this transfers his bid to another, and directs the deed to be made to such person, and if there be no fraud in the transaction, and no loss to the mortgagor thereby, there can be no objection."⁴

§ 423. **Reference in deed to power.**—It is not absolutely necessary to the execution of a power, that the deed should recite or refer to it. But where the grantor in a deed has an estate which will pass without an execution of the power, and the deed is silent on the interest to be conveyed, the law will presume that he intended to convey the estate that he possessed and no more. Hence, if the mortgagee executes a simple conveyance of the

¹ *Robinson v. Ryan*, 25 N. Y. 320; *Brown v. Smith*, 116 Mass. 108; *Grovesnor v. Day*, Clarke Ch. 109; *Jackson v. Bowen*, 7 Cowen, 13; *Gilbert v. Cooley*, Walk. Ch. 494; *Johnson v. Robertson*, 34 Md. 165; *Stackpole v. Robbins*, 47 Barb. 212; *State Bank of Bay City v. Chapelle*, 40 Mich. 447; *Russell v. Whitley*, 59 Mo. 196; *Clark v. Wilson*, 56 Miss. 753; *Niles v. Ransford*, 1 Mich. 338; 51 Am. Dec. 95.

² *Queen City Perpetual Building Assn. v. Price*, 53 Md. 397.

³ *Cloud v. Kansas Loan & Trust Co.*, 52 Mo. App. 318.

⁴ In *Johnson v. Watson*, 87 Ill. 535.

property, without referring to the power, or the nature of his interest in the property, the deed will convey only the estate and power of sale subject to the mortgagor's equity of redemption.¹

§ 424. **Death of purchaser.**—Where a sale is made under a power, and the purchaser dies before the purchase has been completed, his executors may pay the purchase money, and take a deed to themselves, as executors, in trust for the persons interested in the estate. They may maintain an action in ejectment against the mortgagor, based on the title conveyed to them by such deed.²

§ 425. **Recitals in deed.**—Unless the deed of trust or mortgage declares that the recitals contained in the deed,

¹ *Pease v. Pilot Knob Co.*, 49 Mo. 124. Bliss, J., in delivering the opinion of the court, said: "In executing a power of sale, the conveyance, to be regular, should recite or refer to the power. This is the rule, and conveyancers should not disregard it. Still, the omission of such recital or reference will not vitiate an attempted execution, provided it be plain that it was the intention of the party to execute the power. It is a question of intention, as shown by the instrument. It is presumed that one who executes a conveyance designs to perform a valid and effective act; hence, the ordinary test, that, if the instrument would be wholly inoperative, unless taken as an execution of the power, the maker will be considered as having intended to execute it, although no reference to the power is made; but 'if there be any legal interest on which the deed can attach, it will not execute a power': 4 Kent, 334; 2 Washb. 325; *White v. Hicks*, 33 N. Y. 383. If, then, in the case at bar, Rolfe and Jamieson had an estate in the land in controversy that would pass by their deed, it cannot be presumed that they intended to convey more than such estate. Rolfe and Jamieson had an estate as mortgagees, coupled with a power, and the effect of their deed was to convey the estate and power to Van Doren, subject to Johnson's equity of redemption; for a mortgage with a power of sale grants the estate, subject to extinguishment by performance of conditions, and the power, coupled with an interest, and irrevocable, is ingrafted on the estate, and, with the estate, vests in the assignee of the mortgagor [mortgagee]: 4 Kent, 147; 2 Washb. 324. Having, then, an estate—a substantial interest which could pass—the conveyance furnishes no evidence of any intention to execute the power, and thus extinguish the equity of redemption." Where a sale has been made in separate parcels and for separate bids, a deed is not proper which represents the sale as one made in bulk for a single bid: *Grover v. Fox*, 36 Mich. 461.

² *Lewis v. Wells*, 50 Ala. 198.

made in pursuance of the sale under the power, shall be *prima facie* evidence of the facts thus stated, the recitals will not have this effect.¹ But in Iowa the courts seem to take the view that, inasmuch as the statute makes the deed, when properly acknowledged and recorded, admissible in evidence without further proof, the recitals are *prima facie* evidence of the facts recited in the deed, so far as they may be material to the execution of the trust by the trustee.² In Michigan it is held that a deed of the sheriff is no evidence by itself of a regular and legal foreclosure of a mortgage by advertisement under the statute.³ Where, however, the deed of trust provides that, in default of payment, and in the event of a sale, the recitals in any deed which the trustees may execute shall be conclusive evidence of such default, of the creditor's application for the sale of the property, and of the publication of the notice of sale, the grantor, in the absence of fraud, is concluded by such recitals contained in a deed executed by the trustees.⁴

§ 426. Growing crops.—A sale under a deed of trust entitles the purchaser to the crops growing on the land as an appurtenance to the land.⁵ He is entitled to them as against the mortgagor, and all claiming under him

¹ Neilson v. Charitan Co., 60 Mo. 386; Vail v. Jacobs, 62 Mo. 130; Hancock v. Whybark, 66 Mo. 672; Carter v. Abshire, 48 Mo. 300.

² Beal v. Blair, 33 Iowa, 318; Ingle v. Jones, 43 Iowa, 286.

³ Barman v. Carhartt, 10 Mich. 338; Hebert v. Bulte, 42 Mich. 489. See Wood v. Lake, 62 Ala. 489. In the former case a suit was brought upon the guaranty of a note, and the court said: "The sheriff's deed is no evidence of a regular or legal foreclosure. The guarantor has the right to have the proper steps taken in due form of law, in order that bidders may be safe in purchasing, and that the property may not be sacrificed. The regularity of the proceedings becomes important, therefore, in determining the responsibility of the guarantor; and the sheriff's deed is no more evidence of it than an execution is of the proceedings to obtain judgment. The statute requisites must be shown to have been complied with so as to make the sale lawful." See Carter v. Reeves, 75 Mo. 104.

⁴ Carey v. Brown, 62 Cal. 373.

⁵ Harmon v. Fisher, 46 Mich. 312.

subsequently to the registration of the mortgage or trust deed.¹

§ 427. **Sale before default in trust deed passes legal title.**—If the trustee sells before default, his deed will confer the legal title upon the grantee, in trust for the benefit of the grantor.² “By the terms of the trust deed, however, the legal title to the premises was vested in the trustee. At law, a sale and conveyance by him would operate to transfer the legal title. Whether the sale was made in compliance with the power contained in the trust deed or not, was not a proper subject of inquiry in an action of ejectment. If the trustee sold contrary to the terms of the trust deed, the remedy was in equity.”³

§ 428. **Setting aside sale.**—The validity of a sale cannot be questioned by a stranger. This can be done only by the mortgagor or some one who claims under him.⁴ The trustee or mortgagee, in exercising the power of sale, must act with fairness and good faith.⁵ He must sell for the best price possible, and if a purchaser knows that the mortgagee is sacrificing the property, he is not an innocent purchaser, and acquires no rights other than those of an assignee of the mortgage.⁶ A secret arrangement

¹ *Sugden v. Beasley*, 9 Ill. App. 71.

² *Chicago, Rock Island etc. R. R. Co. v. Kennedy*, 70 Ill. 350. But see *Long v. Long*, 79 Mo. 644; *Foster v. Boston*, 133 Mass. 143.

³ *Koester v. Burke*, 81 Ill. 436, 439, per Craig, J. See *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89; *Dawson v. Hayden*, 67 Ill. 52.

⁴ *Wormell v. Nason*, 83 N. C. 32.

⁵ *Longwith v. Butler*, 8 Ill. (3 Gilm.) 32; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Jencks v. Alexander*, 11 Paige, 619. See *Littell v. Grady*, 38 Ark. 584.

⁶ *Runkle v. Gaylord*, 1 Nev. 123. A sale under a first mortgage will not be set aside at the suit of a subsequent encumbrancer for inadequate consideration where there is no fraud: *Hardwicke v. Hamilton*, 121 Mo. 465. Where there is no fraud unless the price is so inadequate as to shock the conscience of the court, the judgment of the court below confirming the sale will not be disturbed: *Martin v. Barth*, 4 Col. App. 346. See, also, *Holdsworth v. Shannon*, 113 Mo. 508; 35 Am. St. Rep. 719; *Austin v. Hatch*, 159 Mass. 598. A mortgagee claiming on his notice a larger amount than is due, and bidding in the property for that

entered into between the mortgagee and a purchaser is a good ground for setting the sale aside.¹ But the party who thus charges collusion between the purchaser and the person selling under the power has the burden of proof of showing it.² And weighty reasons should be produced for setting the sale aside.³ A sale will be invalidated by the fact that the purchaser forms a combination with other bidders to secure the property at a price less than its value.⁴ If a sale has been conducted in good faith and fairly in every respect, it cannot be vacated because the price paid is inadequate.⁵ But the price for which the property is sold, may be so grossly inadequate as to lead to the inference of fraud.⁶ A sale will be set aside when the owner is insane, and the mortgagee, having full cognizance of the fact, buys the land for less than half what it is worth, and a purchaser from the mortgagee who pos-

amount, is liable for the excess to the mortgagor or his assigns: *Fagan v. People's Sav. & Loan Assn.*, 55 Minn. 437.

¹ *Thompson v. Heywood*, 129 Mass. 409.

² *Bush v. Sherman*, 80 Ill. 160; *Munn v. Burges*, 70 Ill. 604.

³ *Carrothers v. Harris*, 23 W. Va. 177.

⁴ *Dover v. Kennerly*, 44 Mo. 145.

⁵ *Kline v. Vogel*, 11 Mo. App. 211; *Kennedy v. Dunn*, 58 Cal. 339; *Hood v. Adams*, 128 Mass. 207. See *Hubbard v. Jarrell*, 23 Md. 66; *Lalor v. McCarthy*, 24 Minn. 417; *Stoffel v. Schroeder*, 62 Mo. 147; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Shine v. Hill*, 23 Iowa, 264; *Dryden v. Stephens*, 19 W. Va. 1; *Farmly v. Walker*, 102 Ill. 617.

⁶ *Horsev v. Hough*, 38 Md. 130; *King v. Bronson*, 122 Mass. 122; *Klein v. Glass*, 53 Tex. 37; *Landrum v. Union Bank of Mo.*, 63 Mo. 48; *Wing v. Hayford*, 124 Mass. 249; *Harnickell v. Orndorff*, 35 Md. 341; *Equitable Trust Co. v. Fisher*, 106 Ill. 189. This is the same rule that applies to a sale under a decree of foreclosure: *Gould v. Libby*, 24 How. Pr. 440; *Strong v. Catton*, 1 Wis. 471; *Littell v. Zuntz*, 2 Ala. 256; 36 Am. Dec. 415; *Am. Ins. Co. v. Oakley*, 9 Paige, 496; 38 Am. Dec. 561; *Kellogg v. Howell*, 62 Barb. 280; *Lefevre v. Laraway*, 22 Barb. 167; *Hill v. Hoover*, 5 Wis. 386; 68 Am. Dec. 70; *Boyd v. Hudson City Acad. Soc.*, 24 N. J. Eq. 349; *Northrop v. Cooper*, 23 Kan. 432; *Allis v. Sabin*, 17 Wis. 626; *Tripp v. Cook*, 26 Wend. 143; *Whitbeck v. Rowe*, 25 How. Pr. 403; *Eleventh Ward Sav. Bank v. Hay*, 55 How. Pr. 444; *Thompson v. Mount*, 1 Barb. Ch. 607; *Warren v. Foreman*, 19 Wis. 35; *Benton v. Shreve*, 4 Ind. 66; *Henderson v. Lowry*, 5 Yerg. 230; *West v. Davis*, 4 McLean, 241; *Martin v. Swofford*, 59 Miss. 328; *Kneeland v. Smith*, 13 Wis. 591; *Mahone v. Williams*, 39 Ala. 202. See on the question of acquiescence, *Sloan v. Frahingham*, 65 Ala. 593.

sesses the same knowledge occupies no better position than the mortgagee.¹ A court of equity will not interfere with a sale, because the mortgagor through mistake or negligence failed to attend the sale, when the proper notices have been given, and no bad faith can be shown on the part of the mortgagee.² If the owner of the equity of redemption becomes bankrupt, the proceedings for sale must be by permission of the court of bankruptcy.³ For the purpose of preventing competition, the assignee of a mortgage, who acted as auctioneer, sold the property to his own brother, as soon as he saw the owner of the equity of redemption approaching the place where the sale was being conducted. The sale was held fraudulent and void.⁴ If the statute requires an affidavit of sale to be made and filed, neglect to do so does not invalidate the sale. Such a provision is merely directory.⁵ The mortgagor, or those claiming under him, may show the falsity of the facts stated in the affidavits, even when they

¹ *Encking v. Simmons*, 28 Wis. 272.

² *King v. Bronson*, 122 Mass. 122.

³ *Hutchings v. Muzzy Iron Works*, 6 Ch. L. N. 27; *In re Brinkman*, 7 Nat. Bank. Reg. 421. The bankruptcy of a subsequent mortgagee does not, however, interfere with the execution of a power of sale in a prior mortgage: *Long v. Rogers*, 6 Biss. 416.

⁴ *Jackson v. Crafts*, 18 Johns. 110. And see *Loeber v. Eckes*, 55 Md. 1; *Banta v. Maxwell*, 12 How. Pr. 479; *Leet v. McMaster*, 51 Barb. 236; *Vail v. Jacobs*, 62 Mo. 130; *Walker v. Carleton*, 97 Hill, 582; *Bigler v. Waller*, 14 Wall. 297; *Mann v. Best*, 62 Mo. 491; *Hurd v. Case*, 32 Ill. 45; 83 Am. Dec. 249; *Soule v. Ludlow*, 6 Thomp. & C. 424; *Murdock v. Empie*, 19 How. Pr. 79; *St. Joseph Manufacturing Co. v. Daggett*, 84 Ill. 556; *Fenner v. Tucker*, 6 R. I. 551; *Robinson v. Amateur Assn.*, 98 Ill. 646; *Sternberg v. Valentine*, 6 Mo. App. 176. See *Helm v. Yerger*, 61 Miss. 44.

⁵ *Field v. Gooding*, 106 Mass. 310; *Menard v. Crowe*, 20 Minn. 448; *Learned v. Foster*, 117 Mass. 365; *Burns v. Thayer*, 115 Mass. 89; *Tuthill v. Tracy*, 31 N. Y. 157; *Frink v. Thompson*, 4 Lans. 489; *Wilkerson v. Allen*, 67 Mo. 502; *Howard v. Hatch*, 29 Barb. 297. See *Bunce v. Reed*, 16 Barb. 347; *Mowry v. Sanborn*, 72 N. Y. 534. In *Smith v. Provin*, 4 Allen, 516, it was held that a sale would be considered void where it was provided in a mortgage that an affidavit of the proceedings under the power should be recorded in a certain county within one year, and the affidavit was not made and filed within such specified period.

are made presumptive evidence of such facts.¹ And to entitle the affidavit to the effect of presumptive evidence, it must be made within a reasonable time after the sale.²

§ 429. **Agreements between mortgagor and mortgagee.**—The fact that an agreement existed between the parties to a mortgage, that a sale should not be made without giving the mortgagor personal notice, does not affect the title of a *bona fide* purchaser in good faith under the power.³ If the property is offered by the auctioneer as free from encumbrances, and the purchaser, on that understanding, offers an amount which is the full value of the property, and the property is in fact encumbered by prior mortgages which are not discharged before the tender of the deed, the purchaser has sufficient reason for refusing to take the deed and complete his purchase.⁴ An agreement between the parties to defer a sale in consideration of the payment of the interest due, does not affect the title of a *bona fide* purchaser.⁵ An invalid sale cannot operate as an assignment of the mortgage, when the sale is made by a person who possesses no authority to act for the mortgagee.⁶ If a *bona fide* purchaser buys the whole of the mortgaged property without notice that a part of it has been released from the operation of the mortgage, and the release is not recorded, the release does not affect his title, and he will hold the entire property.⁷

¹ *Mowry v. Sanborn*, 68 N. Y. 153; 72 N. Y. 534; *Arnot v. McClure*, 4 Denio, 41; *Sherman v. Willett*, 42 N. Y. 146. See *Dwight v. Phillips*, 48 Barb. 116; *Bume v. Reed*, 16 Barb. 347; *Alden v. Wilkins*, 117 Mass. 216; *Childs v. Dolan*, 5 Allen, 319.

² *Mundy v. Monroe*, 1 Mich. 68.

³ *Randall v. Hazleton*, 12 Allen, 412.

⁴ *Mayer v. Adrian*, 77 N. C. 83.

⁵ *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234. See *Montague v. Dawes*, 12 Allen, 397. But see *Redmond v. Packenham*, 66 Ill. 434.

⁶ *Hayes v. Leinlokken*, 48 Wis. 509.

⁷ *Palmer v. Bates*, 22 Minn. 532. If a purchaser at a sale regularly conducted declines to complete the purchase, he may be compelled to do so by a bill in equity for a specific performance. A suit may be had against him for damages: *Sherwood v. Saxton*, 63 Mo. 78; *Gardner v. Armstrong*, 31 Mo. 535; *Dover v. Kennerly*, 38 Mo. 469. A mortgagee

If the purchaser at the sale under the power neglects to record his deed, a person who subsequently takes a deed from the mortgagor acquires no equity of redemption. By the registration of the mortgage, all persons are put upon inquiry as to the proceedings taken under the power.¹ If an agreement is made between the purchaser and the mortgagor, to allow the latter to redeem the estate, the foreclosure may be opened, or the court may enforce the specific performance of the agreement.² If, during the time allowed by law for redemption, a mortgagee, who has purchased the premises at his own sale, stipulates with the mortgagor for an extension of the time of redemption beyond that given by the statute, and takes money from the mortgagor in pursuance of this agreement, the sale becomes ineffectual. The mortgagee is not permitted subsequently to abide by the sale and to derive title under the sheriff's deed.³

or beneficiary will acquire no title by a sale under a mortgage or trust deed, securing a note tainted with usury, and for this reason declared by the statute to be void: *Penny v. Cook*, 19 Iowa, 538; *Hyland v. Stafford*, 10 Barb. 558; *Jackson v. Dominick*, 14 Johns. 435. If a mortgagee purchases at his own sale, and the sale is void, he acquires no rights by such sale: *Queen City Perpetual Building Assn. v. Price*, 53 Md. 397. See *Wittowski v. Watkins*, 84 N. C. 456.

¹ *Farrar v. Payne*, 73 Ill. 82; *Heaton v. Prather*, 84 Ill. 330. And see *Wood v. Augustine*, 61 Mo. 46; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; 8 Am. Dec. 467.

² *Lockwood v. Mitchell*, 7 Ohio St. 387; 70 Am. Dec. 78; *Orme v. Wright*, 3 Jur. 19. But see *Emmons v. Hawn*, 75 Ind. 356.

³ *Dodge v. Brewer*, 31 Mich. 227. But if the agreement is that the whole sum is to be paid during the time allowed for redemption, part payments during that time do not avoid the sale: *Cameron v. Adams*, 31 Mich. 426. And see *Hood v. Adams*, 124 Mass. 481; 26 Am. Rep. 687; *Medsker v. Sweeney*, 45 Mo. 273; *Learned v. Foster*, 117 Mass. 365; *Atwater v. Kinman*, Har. (Mich.) 243; *Wilson v. Wilson*, 4 Iowa, 309. The purchaser and all parties claiming under him are necessary parties to a suit in equity to set aside the sale: *Fairman v. Peck*, 87 Ill. 156; *Candee v. Burke*, 1 Hun, 546. See, also, on the question of practice in setting sales aside, *Jackson v. Bowen*, 7 Cowen, 13; *Robinson v. Ryan*, 25 N. Y. 320; *Vroom v. Ditmas*, 4 Paige, 526; *Thompson v. Heywood*, 129 Mass. 401; *Reece v. Allen*, 5 Gilm. 236; 48 Am. Dec. 336; *Chapin v. Billings*, 91 Ill. 539; *Dawson v. Hayden*, 67 Ill. 52; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89; *Rice v. Brown*, 77 Ill. 549; *Goldsmith v. Osborne*, 1 Edw. Ch. 560. Delay in bringing suit to set aside a void-

§ 430. **Enjoining sale.**—If the mortgage is void on account of fraud, a sale under the power contained in it may be enjoined.¹ A sale will not be enjoined because money is scarce,² nor because it would result in clouding the title.³ The power of sale cannot be exercised for the purpose of securing an advantage under another mortgage.⁴ A sale will not be enjoined to give the mortgagor an opportunity to prosecute a bill to rectify a mistake alleged to have been made in the mortgage in stating the debt.⁵ To entitle the petitioner to an injunction, he must show substantial reasons for seeking the aid of the court.

able sale, may, in some instances, be considered a waiver of all irregularities: *Watson v. Sherman*, 84 Ill. 263; *Jenkins v. Pierce*, 98 Ill. 646; *Bush v. Sherman*, 80 Ill. 160; *Landrum v. Union Bank of Mo.*, 63 Mo. 48; *Caudle v. Murphy*, 89 Ill. 352; *Connolly v. Hamond*, 51 Tex. 635; *Hoffman v. Harrington*, 33 Mich. 392; *Gibbons v. Hoag*, 95 Ill. 45; *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562. See, also, *Joyner v. Farmer*, 78 N. C. 196; *M'Hany v. Schenk*, 88 Ill. 357; *Walker v. Carleton*, 97 Ill. 582; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Schwaz v. Sears*, Walk. Ch. 170. For some late cases on various points relating to the execution of deeds under powers of sale in trust deeds and mortgages, and the construction of such powers, see *Fryar v. Fryar*, 62 Miss. 205; *Learned v. Geer*, 139 Mass. 31; *Bridges v. Ballard*, 62 Miss. 237; *Wilson v. Page*, 76 Me. 279; *White v. McClellan*, 62 Md. 347; *Fetch v. Wetherbee*, 110 Ill. 475; *Newburger v. Perkins*, 62 Miss. 584; *Martin v. Alter*, 42 Ohio St. 94; *Philips v. Bailey*, 82 Mo. 639; *Tartt v. Clayton*, 109 Ill. 579; *Wicks v. Caruthers*, 13 Lea (Tenn.), 353; *Bragdon v. Hatch*, 77 Me. 433; *McGovern v. Union Mut. Life Ins. Co.*, 109 Ill. 151; *Garland v. Watson*, 74 Ala. 323; *Hoyt v. Pantucket Savings Institution*, 110 Ill. 390; *Clevinger v. Ross*, 109 Ill. 349; *Boyd v. Warmack*, 62 Miss. 536; *Laclede Bank v. Keeler*, 109 Ill. 385; *Mitchell v. Nodaway County*, 80 Mo. 257; *Knox v. McCain*, 13 Lea (Tenn.), 197.

¹ *Foster v. Wightman*, 123 Mass. 100; *Southampton Boat Co. v. Muntz*, 12 Week. Rep. 330. See *Fairfield v. McArthur*, 15 Gray, 526; *McCorley v. Tippah County*, 58 Miss. 483; *Powell v. Hopkins*, 38 Md. 1; *Frieze v. Chapin*, 2 R. I. 429; *Green v. Englemann*, 39 Mich. 460.

² *Muller v. Bayly*, 21 Gratt. 521. See, also, *Caperton v. Landcraft*, 3 W. Va. 540.

³ *Armstrong v. Sanford*, 7 Minn. 49; *Preiss v. Campbell*, 59 Ala. 635; *Montgomery v. McEwen*, 9 Minn. 103. But see *Hubbard v. Jasinski*, 46 Ill. 160.

⁴ *Whitworth v. Rhodes*, 20 Law J., N. S., 105.

⁵ *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; 8 Am. Dec. 538. And see *Frieze v. Chapin*, 2 R. I. 429; *Gregg v. Hight*, 6 Mo. App. 579; *Robertson v. Hogshead*, 3 Leigh, 667; *Koger v. Kane*, 5 Leigh, 606.

He must allege specifically the precise grounds that give him a right to relief without making general statements, or leaving inferences to be drawn from other facts, and his rights must be clear; and generally, it may be said as a result of the decisions, the petitioner must make out a strong and convincing case.¹

¹ *Bedell v. McClellan*, 11 How. Pr. 172; *Kershaw v. Kalow*, 1 Jur. N. S., 974; *Montgomery v. McEwen*, 9 Minn. 103; *Pender v. Pittman*, 84 N. C. 372; *Foster v. Reynolds*, 38 Mo. 553; *Sloan v. Coolbaugh*, 10 Iowa, 31; *Vaughan v. Marable*, 64 Ala. 60; *Meysenburg v. Schlieper*, 46 Mo. 209; *Powell v. Hopkins*, 38 Md. 1. See, also, *Tooke v. Newman*, 75 Ill. 215; *Jackson v. Henry*, 10 Johns. 185; 6 Am. Dec. 328; *Vechte v. Brownell*, 8 Paige, 212; *Jones v. Matthie*, 11 Jur. 504; *Close v. Phipps*, 7 Man. & G. 583; *Platt v. McClure*, 3 Wood. & M. 151; *Van Bergen v. Demarest*, 4 Johns. Ch. 37; *Davey v. Durant*, 1 De Gex & J. 535; *Jenkins v. Jones*, 2 Giff. 99; *Struve v. Childs*, 63 Ala. 473; *Outtrin v. Graves*, 1 Barb. Ch. 49; *Prichard v. Wilson*, 10 Jur., N. S., 330; *Foster v. Goodrich*, 127 Mass. 176; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Terry v. Fitzgerald*, 32 Gratt. 843; *Robertson v. Norris*, 1 Giff. 421; *Goodrich v. Foster*, 131 Mass. 217; *Walker v. Cockey*, 38 Md. 75; *Burnet v. Denniston*, 5 Johns. Ch. 35, 41; *Banker v. Brent*, 4 Minn. 521; *Bidwell v. Whitney*, 4 Minn. 76; *Eslava v. Crampton*, 61 Ala. 507; *Jackson v. Dominick*, 14 Johns. 435; *Hyland v. Stafford*, 10 Barb. 558; *Grantt v. Grindall*, 49 Md. 310; *Casaday v. Bosler*, 11 Iowa, 242; *Parkinson v. Hanbury*, 1 Drew. & S. 143; *Culbertson v. Lennon*, 4 Minn. 51; *Osburn v. Andre*, 58 Miss. 609; *Kornegay v. Spicer*, 76 N. C. 95; *Cole v. Savage*, Clarke Ch. 361; *Parnell v. Vaughan*, 77 N. C. 268; *Capehart v. Biggs*, 77 N. C. 261; *Dickerson v. Hayes*, 26 Minn. 100. A person who obtains an injunction against a sale, and allows the advertisement to continue, is chargeable with the entire cost of publication: *Collins v. Standish*, 6 How. Pr. 493.

CHAPTER XVII.

DEEDS BY TRUSTEES FOR SALE.

- § 431. Nature of powers to sell.
- § 432. How created.
- § 433. Trustees cannot delegate power of sale.
- § 434. Married woman as trustee.
- § 435. Services of agent.
- § 436. What a power of sale authorizes.
- § 437. Improvident sale.
- § 438. Effect of trustee's deed.
- § 439. Termination of power by lapse of time.
- § 439 a. Execution of deed without referring to power.
- § 440. How the sale may be made.
- § 441. Private sale or auction.
- § 442. Sale to the highest bidder.
- § 443. What notice to be given.
- § 444. Compliance with terms of power.
- § 445. Notice from recital of consideration.
- § 446. Construction of powers of sale.
- § 446 a. Intention to govern in construction.
- § 447. Construction against trustee.
- § 448. Sale within specified time.
- § 448 a. Exercise of power of sale after accomplishment of purpose of sale.
- § 449. Provision in deed requiring consent.
- § 450. Deed with assent of *cestui que trust*.
- § 451. Declaration of trust.
- § 452. Power to sell upon a contingency.
- § 453. Trust deed becoming void on happening of contingency.
- § 454. Conduct of the sale.
- § 455. Who should execute the deed.

§ 431. Nature of powers to sell.—A power of sale possessed by trustees may be appendant to the legal estate, or it may be merely collateral, with which no interest in the property is coupled.¹ Where a grant or devise

¹ Forbes v. Peacock, 11 Sim. 152; Warneford v. Thompson, 3 Ves. Jr. 513; Stafford v. Buckley, 2 Ves. 179; Prather v. McDowell, 8 Bush, 46; Bolton v. Jacks, 6 Rob. (N. Y.) 166; Reid v. Gordon, 35 Md. 184.

is made to trustees, they take the lands to which the power of sale is attached; but if the trustees are directed to sell the lands, a naked power to sell only is conferred upon them. In the latter case they do not take the legal title, but may divest it from the holder by executing the power.¹ If the instrument creating the trust contains no power of sale, a sale may be decreed in a proper case by a court of equity.²

§ 432. How created.—A power of sale may be created by any words which show such an intention, and may arise from an instrument imposing such duties upon a trustee that he cannot perform them without a sale.³ Where a direction is given to sell personalty, and with the proceeds purchase land, which for the purposes of the trust is to remain personalty, the trustees possess the power of selling the land so purchased.⁴ A power of sale is a necessary implication from an assignment in trust to pay debts, though the power is not expressly conferred.⁵

¹ *Bergen v. Rennall*, 1 Caines Cas. Er. 16; *Ferebere v. Proctor*, 2 Dev. & B. 439; *Zebach v. Smith*, 3 Binn. 69; 5 Am. Dec. 352; *White v. Howard*, 52 Barb. 294; *Peter v. Beverly*, 10 Peters, 532; *Jackson v. Burr*, 9 Johns. 104; *Allen v. Dewitt*, 3 Comst. 276; *McKnight v. Wimor*, 38 Mo. 132; *Thompson v. Gaillard*, 3 Rich. 418; 45 Am. Dec. 778; *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Braman v. Stiles*, 2 Pick. 460; 13 Am. Dec. 445. Mr. Kent, in a note on this subject says: "The distinctions on this subject have the appearance of too curious and overstrained a refinement": 4 Kent's Com. 321, n. d.

² *Bush v. Bush*, 2 Duval, 269. But where a power of sale exists, the sanction of a court is not necessary: *Low v. Grinnan*, 19 Iowa, 193; *Bath v. Bradford*, 2 Ves. 590. When the whole trust is before the court, a trustee cannot sell without its sanction, though express power be given to him: *Drayson v. Pocock*, 4 Sim. 283; *Culpepper v. Aston*, 2 Ch. Cas. 116; *Raymond v. Webb*, Lofft, 66. But where a single sale is before the court, the trustee may make a new sale, without a special order, if the first one is set aside: *Reeside v. Peter*, 35 Md. 221.

³ *Hamilton v. Buckminster*, Law R. 3 Eq. 323; *Williamson v. Suydam*, 6 Wall. 723; *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645; *Mamcomb v. Kearney*, 1 Green Ch. 189; *Rankin v. Rankin*, 36 Ill. 293; 87 Am. Dec. 205; *State v. Cincinnati*, 19 Ohio St. 179; *Fluke v. Fluke*, 1 Green Ch. 478.

⁴ *Tait v. Lathbury*, Law R. 1 Eq. 174; *Stockbridge v. Stockbridge*, 11 Allen, 214; *South Scituate Savings Bank v. Ross*, 11 Allen, 443.

⁵ *Wood v. White*, 4 Mylne & C. 481. A will provided "I sell to A B

So, where it is impracticable to make a division under a devise, with direction to divide and pay over the shares to legatees, a power of sale may be implied; there must, however, be some other duty to perform than a mere division.¹ If a testator has already executed a written contract to sell certain lands, a power of sale contained in a will would not apply to them.² Where it is doubtful by the terms of a trust deed giving power to sell, whether the trustees take as joint tenants or tenants in common, the court will construe the deed, if possible, as a conveyance to them as joint tenants.³

§ 433. Trustees cannot delegate power of sale.—The maxim *delegatus non potest delegare* prevails, and a trustee is not authorized to delegate the power of sale to a third person.⁴ This would obviously be true with greater force of a naked power coupled with no interest.⁵ A sale made by an agent so constituted would be void. Thus, two executors were authorized to sell certain lots of land, if they should deem it advisable, and one of them having gone abroad, sent a power of attorney to his coexecutor to sell on such terms as he might consider expedient;

a parcel of land [describing it], for six thousand dollars, if my executor is satisfied with the payment." A power of sale by the executor was held to be implied: *Jones v. Jones*, 2 Beasl. 236. Unless there is language clearly indicating that a larger power was intended, a power of disposal accompanying a bequest or a devise of a life estate, will be limited to such disposition as a tenant for life can make: *Miller's Administrator v. Potterfield*, 86 Va. 876; 19 Am. St. Rep. 919.

¹ *Scott v. Steward*, 27 Beav. 369; *Winston v. Jones*, 6 Ala. 550; *Mapes v. Tyler*, 43 Barb. 421; *Craig v. Craig*, 3 Barb. Ch. 76; *Rankin v. Rankin*, 36 Ill. 293; 87 Am. Dec. 205; *Moore v. Lockett*, 2 Bibb, 69; 4 Am. Dec. 683; *Clark v. Riddle*, 11 Serg. & R. 311.

² *Roome v. Phillips*, 27 N. Y. 357. See *Price v. Huey*, 22 Ind. 18; *Huyler v. Kingsland*, 3 Stockt. Ch. 406. Another trustee may be appointed where the first dies: *Buchanan v. Hart*, 31 Tex. 647. Where a purchaser takes trust property with notice of the trust he takes it subject to the trust: *Sharp v. Goodwin*, 51 Cal. 219.

³ *Saunders v. Schmaelzle*, 49 Cal. 59.

⁴ *Saunders v. Webber*, 39 Cal. 287; *Newton v. Bronson*, 3 Kern. 587; 67 Am. Dec. 89; *Hardwick v. Mynd*, 1 Anstr. 109; *Hawley v. James*, 5 Paige, 487.

⁵ *Black v. Erwin*, Harp. 411.

the latter entered into an agreement of sale, which was held invalid.¹ Such a case is one of personal trust and confidence, and is personal.²

§ 434. **Married woman as trustee.** — While it is provided in many States that a husband must join in his wife's deed, this provision does not apply to a title held by her in trust. It is not necessary where the donee of a power is a married woman, that her husband should join in the deed.³

§ 435. **Services of agent.** — Trustees, if proper caution is used, may engage the services of an agent or solicitor.⁴ All the trustees, however, should unite in the appointment or ratification, and the original authority or subsequent ratification should be in writing.⁵ Where the

¹ *Berger v. Duffy*, 4 Johns. Ch. 368. The Chancellor said: "One executor in this case cannot commit his judgment and discretion to the other, any more than to a stranger; for *delegatus non potest delegari*. The testator intended that his representatives should have the benefit of the judgment of each of the executors applied to the given case, so long as both of them were alive. The agreement to sell was not valid, being made by one executor without the personal assent and act of the other. The power was not capable of transmission or delegation from one executor to the other, and the rule of law and equity on this point is perfectly well settled: 9 Coke, 75; *Ingram v. Ingram*, 2 Atk. 88. Sir Thomas Clarke, in *Alexander v. Alexander*, 2 Ves. 643; Lord Hardwicke, in *Attorney General v. Scott*, 1 Ves. 417; Lord Redesdale, in *2 Schoales & L. 330*; *Hawkins v. Kemp*, 3 East, 410; Sugden on Powers (2d ed.), 167."

² *Pearson v. Jamison*, 1 McLean, 197; *Berger v. Duffy*, 4 Johns. Ch. 368.

³ *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106. See, also, *Nevin v. Gillespie*, 56 Mo. 320; *Thompson v. Lyon*, 20 Mo. 155; 61 Am. Dec. 599; *Clafin v. Van Wagoner*, 32 Mo. 252; *Ladd v. Ladd*, 8 How. 27; *Thompson v. Murray*, 2 Hill Eq. (S. C.) 204; 29 Am. Dec. 68.

⁴ *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Hawley v. James*, 5 Paige, 318, 487; *Ex parte Belchier*, 1 Amb. 218; *Rossiter v. Trafalgar Life Assn. Co.*, 27 Beav. 377; *Ord v. Noel*, 5 Madd. 498; *Sinclair v. Jackson*, 8 Cow. 582.

⁵ *Mortlock v. Buller*, 10 Ves. Jr. 311; *Sinclair v. Jackson*, *supra*; *Newton v. Bronson*, 3 Kern. (13 N. Y.) 587; 67 Am. Dec. 89. In *Hawley v. James*, 5 Paige, 318, Chancellor Walworth, on page 487, said: "A trustee who has only a delegated discretionary power, cannot give a general authority to another to execute the same, unless he is specially authorized so to do by the deed or will creating such power. A general authority to an agent to sell and convey lands belonging to the estate, or to con-

trustees have the fee, where they have not only a power, but an estate coupled with a power, they may act by the agency of a duly authorized attorney.¹

§ 436. **What a power of sale authorizes.** — An attorney or trustee is not authorized to make partition of lands in which the constituent has an interest as a tenant in common, by virtue of a power of attorney which authorizes him to sell the lands, and do whatever is necessary to carry the power into execution.² Nor does a power to sell confer authority to make an exchange.³ But the same object may be attained by making a partition under the form of a sale.⁴

tract absolutely for the sale of such lands, cannot therefore be given by the trustees. But they may intrust an agent with an authority to make conditional sales of lands lying at a distance from the place of residence of the trustees, subject to the ratification of such trustees or any two of them. And they may also empower him to make and execute valid conveyances of the land thus sold, upon a compliance with the terms of sale, after such sales have been so ratified by them. The purchaser in such case, however, would probably be bound to show that this condition precedent had been complied with, in order to render his title perfect, when the conveyance was executed by the agent under such a power. The better course in a case of this kind, therefore, is to intrust the agent with a discretionary power to contract, subject to the ratification of the trustees, upon his report of the facts; and they should themselves execute the conveyance, when the terms of the sale have been complied with, and transmit it properly acknowledged to the agent, to be delivered to the purchaser."

¹ Telford v. Barney, 1 Iowa, 591; May's Heirs v. Frazee, 4 Litt. 391; 14 Am. Dec. 159. As to conveyances by attorney in the case of trustees for creditors, see Blight v. Schenck, 10 Barr, 285; 51 Am. Dec. 478; Johns v. Sargeant, 45 Miss. 332. It is held a sheriff cannot be appointed to sell upon the death of the trustee: Miller v. Evans, 35 Mo. 45.

² Borel v. Rollins, 30 Cal. 409; Bradshaw v. Fane, 3 Drew. 536; McQueen v. Farquhar, 11 Ves. Jr. 467; Brassey v. Chalmers, 4 De Gex, M. & G. 528; 16 Beav. 223; Woodhull v. Longstreet, 3 Harris, 419; Carr v. Petitioner, 16 R. I. 645; 27 Am. St. Rep. 773. A power of sale does not imply a power to mortgage: Kent v. Morrison, 153 Mass. 137; 25 Am. St. Rep. 616.

³ King v. Whiton, 15 Wis. 684; Ringgold v. Ringgold, 1 Har. & G. 11; 18 Am. Dec. 250; School v. McCully, 11 Rich. 424; Taylor v. Gallo-way, 1 Hemp. 232. See Attorney General v. Hamilton, 1 Madd. 214; Abel v. Heathcote, 4 Brown Ch. 278; 3 Ves. Jr. 98; 2 Sugden on Powers, 506.

⁴ Marshall v. Sladden, 7 Hare, 438; Phelps v. Harris, 51 Miss. 789;

§ 437. **Improvident sale.**—The general rule is that, if the trustee acts improvidently, he is personally responsible, but the sale is valid.¹ But a court may, under certain circumstances, set the sale aside.² Where proper diligence has been used in endeavoring to obtain the best possible price for the property, the fact that the price is inadequate will not avoid the sale.³ But the inadequacy may be so palpable and gross as to be indicative of fraud.⁴

§ 438. **Effect of trustee's deed.**—A deed made by an executor under a power contained in a will to a purchaser for a valuable consideration, will prevail against the unre-

Leigh v. Ashburton, 11 Beav. 470. See *Bartram v. Whichcote*, 6 Sim. 86. By a marriage settlement real estate was conveyed by a wife to trustees with authority to sell and convey, with the written consent of herself and husband, "in such manner as to convey the fee" to the purchaser. Afterward the trustees, by an order of court, with the consent of the husband and wife, mortgaged the property. The property was sold under foreclosure, but the purchaser refused to complete the purchase for the reason that the mortgage bound only the life interest of the wife, while he had purchased the whole title. The trustees, subsequently, by an arrangement between all the parties, conveyed to the purchaser the remainder. The court held that the sale by the trustees under the circumstances was a valid exercise of the power of sale: *Dyett v. Central Trust Co.*, 140 N. Y. 54.

¹ *Harper v. Hayes*, 2 Giff. 216; *Osgood v. Franklin*, 2 Johns. Ch. 27; 7 Am. Dec. 513; *Pechel v. Fowler*, 2 Anstr. 550; *Quackenbush v. Leonard*, 9 Paige, 347; *Chesley v. Chesley*, 45 Mo. 540.

² *Hoppes v. Check*, 21 Ark. 585; *Clarkson v. Creely*, 35 Mo. 95. In the former case, the facts were that upon the day of the sale but few persons were present; application was made by the debtor to the trustee to delay the sale as long as possible, the debtor stating that he expected to obtain an injunction preventing the sale; the trustee promised that he would not sell before 1 o'clock, and the debtor departed; in consequence of the urging of the creditor, the trustee sold the land between 11 and 12 o'clock, and the creditor, who was the only bidder, purchased the land at one-fifth of its value. The sale was held fraudulent and void. Specific performance may be refused where there has been misfeasance on the part of the trustee, though no blame is attached to the purchaser: *Hill v. Buckley*, 17 Ves. Jr. 394; *Bridger v. Rice*, 1 Jacob & W. 74; *Ord v. Noel*, 5 Madd. 440; *White v. Cuddon*, 8 Clark & F. 766.

³ *Bochlert v. McBride*, 48 Mo. 505; *Carter v. Abshire*, 48 Mo. 300. And see *Morse v. Hill*, 136 Mass. 60.

⁴ *Brooker v. Anderson*, 35 Ill. 66.

corded deed of a former grantee, who was not in possession, and of whose deed the second purchaser had no actual or constructive notice.¹ Where trustees possessing a discretionary power to sell and convey the trust property, sell the property and receive the purchase price, it is their duty to convey the legal title to the purchaser. They, in case of refusal, may be compelled by a court of equity to execute a deed.² A sale will not be set aside by a court of equity merely because it was made after the grantor's death.³ Where a trustee was directed by an order of court to sell land, taking back at the same time a mortgage, and he sold the land for cash, it was held that a subsequent purchaser was chargeable with notice of the terms of the order.⁴

§ 439. When the power terminates by lapse of time. A limitation as to time may be directory merely. Thus, a power "to sell with all convenient speed, and within five years," will authorize a sale after the expiration of the five years.⁵ The time, however, may be of the essence of the power, and in such case the direction must be observed.⁶ Where an estate is vested in trustees for a certain person for life, and where it is provided that at his death they may sell, they cannot sell during the life of such person, even if it be the most advantageous course for all parties.⁷ Where trustees are empowered to sell a certain portion of an estate, they may, as a general proposition, join in a sale of the whole property for a gross sum, and the purchase money may be equitably divided.⁸

¹ *Stewart v. Mathews*, 19 Fla. 752.

² *Saunders v. Schmaelzle*, 49 Cal. 59.

³ *Spencer v. Lee*, 19 W. Va. 179.

⁴ *Dickinson v. Worthington*, 4 Hughes, C. C. 430.

⁵ *Pearce v. Gardner*, 10 Hare, 287; *Smith v. Kenney*, 33 Tex. 283; *Cuff v. Hall*, 1 Jur., N. S., 783; *Shatter's Appeal*, 4 Pa. St. 83.

⁶ *Booraem v. Wells*, 4 Green Ch. 87.

⁷ *Johnstone v. Baber*, 8 Beav. 233. See *Mills v. Dugmore*, 30 Beav. 104; *In re Brown*, Law R. 10 Eq. 349.

⁸ *McCarogher v. Whielon*, 34 Beav. 107. If the purchase money cannot be ratably apportioned, or if the sale has not been advantageous to the *cestui que trust*, the purchaser will not be compelled to accept the

§ 439 a. **Execution of deed without referring to power.**—If the donee of the power owns an interest in the land, the fact that he executes a deed in his individual name, without referring to the power, is not conclusive against the execution of the power; but the instrument may be held to convey the entire estate where it is apparent, in view of the circumstances under which the deed was made, and the situation of the subject, that the donee intended to transfer the whole estate, and to exercise the power necessary for that purpose.¹ Where the owner of an undivided half of land makes the owner of the other half his executor, and also tenant for life, with power to sell in fee as executor, a conveyance by him of the whole premises, without referring to the will or any power contained in it, or mentioning his capacity as executor, but purporting to be a conveyance made in his own right, transfers no title as against the remainderman.² Where a testatrix gave all her property to her husband for the term of his natural life, “to be by him managed and disposed of in whatever way may to him seem just and right,” and directed that all property that might remain at his death should be divided among their children, and land belonging to their community estate was conveyed by him by a deed of trust to secure the payment of money advanced to him, the deed making no reference to the will, but containing covenants of warranty, it was held to be a sufficient execution of the power to convey the entire title and not merely the husband’s estate.³ A deed made under a power in a will, will be considered to have been made in execution of the power, although it does not refer in terms to the will.⁴ Where a deed is in proper form and sufficient to convey the grantor’s title, if

title: *Rede v. Oakes*, 32 Beav. 555. The tenant for life and trustees for the remainderman may join in a conveyance and transfer a good title: *Clark v. Seymour*, 7 Sim. 67.

¹ *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, and cases cited.

² *Holder v. American Investment & Loan Co.*, 94 Ga. 640.

³ *Henderson v. Smith*, 62 Fed. Rep. 708; 10 C. C. A. 602.

⁴ *Scheidt v. Crecelius*, 94 Mo. 322; 4 Am. St. Rep. 384.

he possessed any, it will, in case he has no title, be considered as an execution of a power of sale vested in him as executor and trustee.¹ Although the grantor supposed himself to be the owner, and the deed to be a transfer of his title, it may operate as an execution of a power of sale.²

§ 440. **How the sale may be made.**—The trustees may make separate divisions of the property, and sell the lots at various times.³ They also have the power of combining several parcels into one where they form a single farm.⁴ But a trustee under a power of sale has no power to sell the timber separately from the land; nor can he sell the land without the timber.⁵ Where the trustees possess the power of selling at the written request and direction of another, specific performance will not be decreed of a sale made by them in the absence of such writing; and this is true, even in the case of part performance.⁶ So, if the power to sell and convey is subject to the approval of the *cestui que trust*, the legal title, without the approval of the *cestui que trust*, will not pass by the deed of the trustee to a purchaser.⁷

¹ Terry v. Rodahan, 79 Ga. 278; 11 Am. St. Rep. 420.

² Terry v. Rodahan, 79 Ga. 278; 11 Am. St. Rep. 420.

³ Gray v. Shaw, 14 Mo. 341; Carter v. Abshire, 48 Mo. 300; Ord v. Noel, 5 Madd. 438; Lessee of Stall v. Macalester, 9 Ohio, 19; Ex parte Lewis, 1 Gill & J. 69; Ewing v. Higby, 7 Ohio, 198; 28 Am. Dec. 633; Bloomer v. Waldron, 3 Hill, 372; Delaplaine v. Lawrence, 3 Comst. 301; Sumrall v. Chaffin, 48 Mo. 402; Miller v. Evans, 35 Mo. 45; Gillespie v. Smith, 29 Ill. 472; 81 Am. Dec. 328.

⁴ Kellogg v. Carrico, 47 Mo. 157.

⁵ Cholmeley v. Paxton, 3 Bing. 207. See, as to separate sale of minerals, Buckley v. Howell, 29 Beav. 546; Cadwalader's Appeal, 64 Pa. St. 293.

⁶ Sykes v. Sheard, 33 Beav. 114; Adams v. Broke, 1 Younge & C. Ch. 627; Phillips v. Edwards, 33 Beav. 440; Blackwood v. Burrowes, 2 Con. & L. 459.

⁷ Sprague v. Edwards, 48 Cal. 239, and cases cited. A sale directed to be made by two executors is not rendered invalid by the absence of one if he subsequently ratifies it: Dunn's Executors v. Kenick, 40 W. Va. 349. Where it appears that a testator intended that a power of sale should be exercised jointly by the executors and trustees, the intention must be given full force and effect: Poole v. Anderson, 80 Md. 454.

§ 441. **Private sale or auction.**—Where the power contains no express directions as to the manner in which the sale shall be conducted, the trustee has the option of determining whether a private sale or a public auction will best promote the interests of the trust estate.¹ Where land was conveyed to the defendant in trust to sell it “at auction, or otherwise, in whole or in parcels, on giving three weeks’ notice thereof,” it was held that the direction as to the notice to be given had reference only to a sale by public auction, and that a private sale without notice was valid.²

§ 442. **Sale to the highest bidder.**—“By the highest bidder must be understood a person who makes the highest bid in good faith. The trustee is not bound to accept every bid. He is necessarily clothed with a prudent and sound discretion, and the court will always sustain him in refusing bids which would manifestly defeat and frus-

¹ *Davey v. Durant*, 1 De Gex & J. 535; *Ex parte Hurley*, 1 D. & Ch. 631; *Harper v. Hayes*, 2 Giff. 210; *Ex parte Dunman*, 2 Rose, 66; *Ex parte Ladbrooke*, 1 Mont. & A. 384; *Noble v. Edwardes*, Law R. 5 Ch. D. 378; *Jackson v. Williams*, 50 Ga. 553; *Ex parte Goden*, 1 D. & Ch. 323; *Huger v. Huger*, 9 Rich. Eq. 217. See *Maltox v. Eberhart*, 38 Ga. 581; *Crane v. Reeder*, 22 Mich. 339; *Burr v. McEwen*, Bald. 154; *Ashhurst v. Ashhurst*, 13 Ala. 781.

² *Minuse v. Cox*, 5 Johns. Ch. 441; 9 Am. Dec. 313. The chancellor said: “The trustee under this deed as well as under the will, had a discretion to sell at public or private sale, and the direction to give *three weeks’ public notice in the daily papers*, evidently alluded to sales at auction, and not private sales. The direction was to give three weeks’ notice *thereof*, that is, of the auction. To give three weeks’ notice of a private sale would be absurd; and it would be equally so to suppose the testator, when he gave to his trustee a direction to sell at auction or otherwise, that he meant to debar him from accepting of an advantageous offer, because there had not been three weeks’ notice of the time of accepting it. These words must be construed according to the reason of the thing, and the usages of business applicable to the case; and there can be no possible doubt of the intention of the deed, that the notice should be applied to the auction sales, and not to any other. But if that notice did apply to all and every sale, public and private, I should concur in opinion with the master that the sale without the notice would be valid, and confer a good title on the purchaser; and that the only consequence would be that the trustee might be responsible for any deficiency in the price for which it sold below the real value of the land.”

trate the very object and purposes of a sale.”¹ A direction of a testator to have his property sold at auction is substantially complied with if the property is advertised for sale, and a price is offered by letter which is not increased when the sale occurs.² A sale at auction is usually preferred, because no question can be raised as to the adequacy of the price.³

§ 443. What notice to be given.—It is not necessary that the sale should be advertised, where the trustee has a discretion given to him in express terms as to the manner of the sale.⁴ If the sale is to be made at auction, it is the duty of the trustee to have the proper advertisements made and to have all parties duly notified.⁵ The advertisement should give correct information as to the time and place of sale, and the description of the land should be sufficiently accurate to enable it to be identified.⁶

¹ Brent, J., in *Gray v. Viers*, 33 Md. 18, 22.

² *Tyree v. Williams*, 3 Bibb, 365, 367; 6 Am. Dec. 663. A direction to sell at public auction should be followed: *Greenleaf v. Queen*, 1 Peters, 145. But where there was a direction to sell at public auction, and the trustees were unable to consummate a sale, though they made vigorous efforts to do so, a private sale made in good faith, though for less than a public offer, was held to be valid: *Tyson v. Mickle*, 2 Gill, 383; *Gibson's case*, 1 Bland, 138; 17 Am. Dec. 257; *Beebe v. De Baun*, 3 Eng. 567; *Gibbs v. Cunningham*, 1 Md. Ch. 44. See *Farmer v. Dean*, 32 Beav. 327; *Bousfield v. Hodges*, 33 Beav. 90. The bid and sale may be waived, and property sold again: *Dover v. Kennerly*, 38 Mo. 469. New notices, however, should be given: *Judge v. Booge*, 47 Mo. 545: See *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 416. Where a bid is made under a misapprehension, it may be waived, and the land may be sold at a lower figure: *Waterman v. Spaulding*, 51 Ill. 425.

³ *Shine v. Hill*, 23 Iowa, 264; *Waterman v. Spaulding*, 51 Ill. 425. As to the liability of the trustee where the price at private sale is less than the value, see *Connolly v. Parsons*, 3 Ves. 628, n; *Hentze v. Stingel*, 1 Md. Ch. 283; *Ord v. Noel*, 5 Madd. 440; *Taylor v. Tabrum*, 6 Sim. 281; *Mortlock v. Buller*, 10 Ves. 292, 309; *Johnson v. Dorsey*, 7 Gill, 269; *Penny v. Cook*, 19 Iowa, 538.

⁴ *McDermott v. Lorillard*, 1 Edw. Ch. 273.

⁵ *Blennerhassett v. Day*, 2 Ball & B. 133. Where diligence in this matter is not used, the court may enjoin the sale: *Jenkins v. Jones*, 2 Giff. 99.

⁶ *Newman v. Jackson*, 12 Wheat. 570; *Stephenson v. January*, 49 Mo. 465; *Reeside v. Peter*, 35 Md. 220.

§ 444. **Compliance with terms of power.**—If a particular place is specified where notice is to be given, a sale without a notice at the place specified is void. Thus, where a power of sale provided that notice should be given by posting the same on the front door of a certain hotel, and the notice was posted near the door, but not on it, it was held that the direction as to notice had not been complied with.¹ The advertisement must be made every day, where it is required by the power or a statute that notice of a certain number of days before the sale should be given.² Compliance with the power where notice is required must be shown by parties relying upon the validity of the sale.³

§ 445. **Notice from recital of consideration.**—The title to land was held by A in trust under a deed duly recorded which gave him power to sell, provided such sale was for the benefit of the *cestui que trust*, and to reinvest the proceeds. A executed a deed to B reciting the consideration to be one dollar, and other valuable considerations. B executed a mortgage on the land to C, and then reconveyed to A, the trustee, subject to the mortgage. After the registration of these deeds, C assigned the mortgage held by him to D. The recital in the deed executed by A to B, the court held, was not sufficient notice to D; that A's acts were not in compliance with the power conferred upon him; and the court held further that no obligation rested upon D to ascertain whether the trustee had reinvested the proceeds obtained from the sale.⁴

¹ *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564. In that case, which was one under a trust deed, the court said that the fact that the proprietor of the hotel would not allow the notices to be posted on the door, did not affect the question. The creditor might bring a bill of foreclosure.

² *Stine v. Wilkson*, 10 Mo. 75. See *Campbell v. Tagge*, 30 Iowa, 305; *Lefler v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672.

³ *Gibson v. Jones*, 5 Leigh, 370; *Hahn v. Pendell*, 1 Bush, 358. If the proper notice has in reality been given, the sale is not vitiated because there is a clerical error in the statement of the notice in the deed: *O'Neil v. Vanderburg*, 25 Iowa, 104.

⁴ *Norman v. Towne*, 130 Mass. 52.

§ 446. **Construction of powers of sale.**—The conditions and terms prescribed in the instrument of trust must be observed.¹ A power to executors to sell at a particular time, as when the *cestui que trust* arrives at majority, cannot be executed before that time. A sale attempted to be made before the time arrives is void.² A testator in his will provided that his executors, after the decease of his wife, should rent out his lands and support one of his sons out of the proceeds. He also provided that none of his estate should be sold during the life of such son, but at his death all his real estate should be sold, and all his children should receive share and share alike. It was held that even an act of the legislature could not direct a sale within the time during which the sale was forbidden by the testator.³ Where a power is given to sell, after redemption from a tax sale, a sale cannot be made under the power before redemption is made.⁴ Where the condition annexed to a power of sale is that it shall be exercised only when the income from the property is insufficient to support the testator's wife comfortably, a valid sale can be made only in that event.⁵ Where it is provided that the sale shall be made with the consent of the tenant for life, his consent is necessary to an effectual

¹ *Rodman v. Munson*, 13 Barb. 63; *Alley v. Lawrence*, 12 Gray, 373; *Palmer v. Williams*, 24 Mich. 328; *Caldwell v. Brown*, 36 Ill. 103; *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; *Carnes v. Polk*, 4 Cold. 87; *Drusadow v. Wilde*, 63 Pa. St. 170; *Styer v. Freas*, 15 Pa. St. 339; *Jackson v. Ligon*, 3 Leigh, 191.

² *Loomis v. McClintock*, 10 Watts, 274. This is true even if made by order of court: *Blacklow v. Laws*, 2 Hare, 40.

³ *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Dec. 499. And see *Truell v. Tyson*, 21 Beav. 439; *Styer v. Freas*, 15 Pa. St. 339; *Cuff v. Hall*, 19 Jur. 973; *Smith v. Kinney*, 33 Tex. 283. See *De Laurencel v. De Boom*, 48 Cal. 581.

⁴ *Devinney v. Reynolds*, 1 Watts & S. 332.

⁵ *Minot v. Prescott*, 14 Mass. 495. See *Harlan v. Brown*, 2 Gill, 475; 41 Am. Dec. 436; *Ormsby v. Tarascon*, 3 Litt. 411; *Champlin v. Champin*, 3 Edw. Ch. 571; *Greer v. McBeth*, 12 Rich. Eq. 254; *Bunner v. Storm*, 1 Sand. Ch. 357; *Slocum v. Slocum*, 4 Edw. Ch. 613; *Cresson v. Ferree*, 70 Pa. St. 446. And see, generally, *Hill v. Den*, 54 Cal. 6; *Ord v. De la Guerra*, 18 Cal. 67.

execution of the power.¹ If the grantor or donor annex a condition to the trust for sale, that his consent in writing shall first be obtained, a sale is inoperative without this consent, and the power is destroyed by the grantor's death.² Where the power is to sell after the death of a tenant for life, a sale cannot be made before.³ As the limitation placed upon the power of sale, that it shall not be exercised until the death of the tenant for life, is made generally for the benefit of the latter, he may waive this provision in his favor by joining in the conveyance.⁴ But where this limitation is not imposed for the benefit of the tenant for life, but is made for the benefit of the

¹ *Bateman v. Davis*, 3 Madd. 98; *Rickett's Trusts*, 1 Johns. & H. 70. See *Tyson v. Mickle*, 3 Gill. 376; *Sprague v. Edwards*, 48 Cal. 239.

² *Kissam v. Dierkes*, 49 N. Y. 602.

³ *Blacklow v. Laws*, 2 Hare, 40; *Davis v. Howcott*, 1 Dev. & B. Ch. 460; *Jackson v. Lignon*, 3 Leigh, 161; *Styer v. Freas*, 15 Pa. St. 339.

⁴ *Styer v. Freas*, *supra*; *Gast v. Porter*, 13 Pa. St. 533; *Truell v. Tysson*, 21 Beav. 439. See *Welton v. Palmer*, 39 Cal. 456. But see *Davis v. Howcote*, 1 Dev. & B. Ch. 460, where Gaston, J., says: "It is a doubtful point upon the authorities, where there is a devise to one for life, and that after his decease the land shall be sold, whether a sale can be made until after the decease of the tenant for life. However this may be, when an intent may be collected, that the testator did not mean by the words, after the decease of the tenant for life, to limit and postpone the time of the sale, but only to make the determination of his estate (see Hargrave's note to Co. Litt. 113, and *Vredale v. Vredale*, 3 Atk. 117), we think that in this case such an intent is repelled by the direction given with respect to the application of the proceeds of the sale. The testator, after the devise for life, expresses his wish that the land should be sold, and the proceeds divided among his four children, or the survivors of them. It is admitted by the counsel on both sides, and the pleadings proceed upon the understanding, that such is the legal interpretation of the will (therefore it is, that the representatives of the deceased children are not brought before the court), that the survivors are meant those living at the death of the tenant for life. The sale directed is for the purpose of dividing among these children, the *value* of that which is itself unsusceptible of partition. If all these children had died before their mother, he unquestionably did not direct that a sale should then be made. The power was a trust, to be called into action only for the benefit of the *cestuis que trust*. If but one child had survived the tenant for life, the executors might well have hesitated in undertaking a sale." A sale cannot be hastened where the tenant for life is a widow who waives the provisions of the will, but claims dower: *Jackson v. Lignon*, 3 Leigh, 161.

remainderman under the belief that the value of the property will increase, or for the purpose of securing any other expected advantage, the tenant for life cannot accelerate the sale.¹

§ 446 a. **Intention to govern in construction.**—A power of sale in a will is to be construed as are other parts of the will, in that the intention is to govern.² A power to “invest or use,” all the property authorizes a sale.³ Where a devisee is authorized to sell if he “sees cause to send my wife to the asylum,” and he elects to send her there, having obtained an adjudication of her insanity, the power becomes operative, although the wife was not sent to the asylum.⁴ If a will gives residuary estate for life with remainder over, and confers power on the life tenant if he should deem it advisable for the benefit of the life estate to sell any portion of it, and appropriate the proceeds to his own use, the life tenant may sell and convey an absolute title to the property.⁵ The execution of a power will not be defeated because of a provision in excess of the power, but it will be executed so far as permissible, and the excess will be disregarded.⁶ If a will containing a power of sale does not mention the donee of the power it is to be exercised by the executors.⁷

§ 447. **Construction against trustee.**—Where a trustee has no beneficial interest, a deed conveying land to him with power to sell and lease, will be construed most strongly against the trustee, and in favor of the beneficiary. “In general, doubtful clauses in a deed,” says Mr. Justice Crockett, “are construed most strongly against the grantor, and as favorably to the grantee as the language will permit. . The same rule holds good as between

¹ *Gast v. Porter*, 13 Pa. St. 535; *Pearce v. Gardner*, 10 Hare, 290.

² *Cotton v. Burkelman*, 142 N. Y. 160; 40 Am. St. Rep. 584.

³ *Crawford v. Wearn*, 115 N. C. 540.

⁴ *Harp v. Wallin*, 93 Ga. 811.

⁵ *Security Co. v. Pratt*, 65 Conn. 161.

⁶ *Hillen v. Iselin*, 144 N. Y. 365.

⁷ *Lesser v. Lesser*, 32 N. Y. S. 167.

a trustee of an express trust, having no interest in the trust fund, and the *cestui que trust*. In such cases doubtful clauses in the instrument creating the trust are construed strictly as against the trustee acting under a power, and most favorably to the beneficiary under the trust.”¹

§ 448. **Sale within specified time.**—Where a power to sell lands, the title to which is vested in a trustee for the payment of debts, is limited to a specific time, as three years, the lands will not become divested of the trust, if the trustee fails to make a sale within the limited period. Though the power of the trustee to sell may be extinguished by lapse of time, the trust survives and will be enforced in a court of equity for the benefit of the beneficiaries.² Where an executor was authorized by a will to sell the residue of the testator's estate within two years from his decease, a sale made within that period is valid, though the deed to purchaser was not executed until afterward, and the time of sale may be shown by parol evidence.³ A power possessed by executors by virtue of their office ceases, when the objects for which it was given have been attained.⁴ A power of sale which is to be exercised with the consent of a majority of the children living at the time of its execution, may be executed without such consent when the children are all dead at that time.⁵

¹ Sprague v. Edwards, 48 Cal. 239, 247.

² Smith v. Kinney's Executors, 33 Tex. 283. See, Pearce v. Gardner, 10 Hare, 287.

³ Harlan v. Brown, 2 Gill, 475; 41 Am. Dec. 436.

⁴ Jackson v. Jansen, 6 Johns. 73; Ward v. Barrows, 2 Ohio St. 241; Stroughill v. Anstey, 1 De Gex, M. & G. 635; Sharpsteen v. Tillou, 3 Cowen, 651. Where a sale of the life estate has been made by the tenant for life to a third person, he must consent to a sale by the trustees: Ben v. Bulkeley, Doug. 292; Vincent v. Ennys, 3 Vin. Abr. 433; Warburton v. Farn, 16 Sim. 625; Tyrrell v. Marsh, 3 Bing. 31. But see Alexander v. Mills, 3 Law J. Ch. 407. Where the tenant for life becomes insolvent, his assignee should join with him in assenting to the sale: Jones v. Winwood, 10 Sim. 150; Holdsworth v. Goose, 29 Beav. 111; 1 Sugden on Powers, 80; Eisdell v. Hammersley, 31 Beav. 255.

⁵ Leeds v. Wakefield, 10 Gray, 514. Shaw, C. J., delivering the

§ 448 a. Exercise of power of sale after accomplishment of purpose of sale.—It will not be presumed that a testator intended that a power of sale should be exercised after the accomplishment of its purpose, and hence, though expressed in the most general terms as to the time for its exercise, it cannot be exercised if the purpose for its creation has ceased.¹ Where the power is to sell during the lifetime of a person, accompanied by a peremptory direction to sell immediately after his death,

opinion of the court, said: "The only ground on which any doubt would seem to arise in this case is, that a power of sale was made conditional on the consent in writing by the children. The purpose of the testator, we think, was to make a disposition of his whole estate; and the mode was by ordering his executor to sell, as soon as all the children should come of age and the widow decease; should she die before the youngest child was of age, the sale might then be postponed till the latter contingency should happen; it was then to be made. There might therefore be a case in which the sale should be made, when all or some of the children should be living and of age, and then it was the intent of the testator that such consent should be obtained. But if, on the decease of the widow, there were no children surviving, no children then living, there was no apparent purpose which could have affected the mind of the testator to prohibit a sale, when such consent of children had become alike unnecessary to protect their interests and impossible. We think the condition was annulled by the event of all the children dying, and therefore that the power became thereby unconditional. Whether this would be the case with respect to a mere naked power, the right execution of which depends upon a strict compliance with all the terms on which it is given, or not, we have no doubt, that it applies to a trust power, where the execution of the power is obviously a means only of carrying into effect the ultimate object of the testator in providing for the benefits specially designated for the declared objects of his bounty. A subsequent clause of the will directs that if the wife shall not decease until all the children have come of age, then it shall be the duty of the executor, immediately on the decease of the wife, to enter upon and sell the estates, and to proceed in the same way and under the same limitations, and to distribute the proceeds in the same manner. This, we think, applies to the actual state of things as it should exist; if children then survive, they were to be consulted, and their consent in writing obtained; otherwise being impossible, the sale was not to be made without such consent." A power to sell for the purpose of paying an installment then due, does not authorize a sale to discharge that installment and one not due: *Ormsby v. Tarascon*, 3 Litt. 411.

¹ *Wilkinson v. Buist*, 124 Pa. St. 253; 10 Am. St. Rep. 580.

the executor cannot grant the privilege to buy at any time within three and a half years.¹

§ 449. Provision in deed requiring consent.—Where a trustee was empowered to sell lands for the purposes of reinvestment when the major part of the children should recommend and advise it, the consent of the majority of those living at the time the sale was made was held to be sufficient.² Where the consent of a person is necessary, he will not be allowed to refuse it, it is said, for selfish purposes.³ Where a testator conferred on his “executors” the power to sell his land, but provided that the power should be exercised only with the consent of his surviving wife, and in a clause occurring subsequently, appointed his wife executrix and sole representative, the power to sell, it was held, was vested in the wife alone, and she might sell without the advice or co-operation of any other person.⁴ If a sale is authorized by the provisions of the deed only on the written consent of the *cestui que trust*, such consent must be secured before the power can be exercised.⁵ Where the power to sell and convey is conferred under an express trust, it is not necessary for the trustee to apply to a court for authorization of the sale.⁶

§ 450. Deed with assent of cestui que trust.—Where the trustees are empowered by the trust deed to sell and

¹ *Hickok v. Still*, 168 Pa. St. 155; 47 Am. St. Rep. 880.

² *Sohier v. Williams*, 1 Curt. 479. See, also, *Wilson v. Bennett*, 5 Eng. L. & Eq. 45; *Hewett v. Hewett*, 2 Eden, 332; 1 Sugden on Powers, 144.

³ *Norcum v. D'Oench*, 2 Ben. (Mo.) 93. When required to be in writing, any writing giving the consent is sufficient: *Montefiore v. Browne*, 7 H. L. Cas. 241.

⁴ *Williams v. Williams*, 1 Duval, 221; *Griswold v. Perry*, 7 Lans. 98. Where the consent of a person occupying a particular office is necessary, the consent of the successors in office of such person is generally sufficient: *Barber v. Cary*, 1 Kern, 397. The death of a person upon whose consent the power to sell is to be exercised will generally defeat the power: *Sykes v. Sheard*, 2 De Gex, J. & S. 6. See *Alley v. Lawrence*, 12 Gray, 373.

⁵ *Berrien v. Thomas*, 65 Ga. 81.

⁶ *Iles v. Martin*, 69 Ind. 114. The grantee's title cannot be questioned for want of consideration: *Iles v. Martin*, *supra*.

dispose of all the trust estate, or any part of it "with the approbation or at the request" of the *cestui que trust*, the latter gives such approbation by joining in the execution and acknowledgment of the deed made by the trustees for the purpose of consummating a sale. The grantee takes the title as fully as if it was held by the grantor in the deed of trust.¹ "It is impossible," said Chief Justice Rhodes, "to conceive of any mode in which she could more clearly and positively manifest and express her approbation of a sale and disposal of the trust estate, than by joining in the execution and acknowledgment of the deed by which the trustee effected the sale and conveyance of the estate. She held the beneficial interest, while the trustee held the legal title."²

§ 451. Declaration of trust. — If a conveyance is made to a person as trustee, and the trustee at the time of its execution delivers to the grantor a written declaration, which in unambiguous terms specifies the objects and purposes of the trust, the powers of the trustee and his duties are to be ascertained from the deed and the declaration.³

§ 452. Power to sell upon a contingency. — When it is provided that the execution of the power is to take place only upon the occurrence of some event, or upon a condition of any character, the happening of the event, or the performance of the condition, is essential to the valid exercise of the power.⁴ A distinction is to be drawn between conditions precedent and conditions subsequent

¹ Welton v. Palmer, 39 Cal. 456.

² Welton v. Palmer, *supra*.

³ Tyler v. Granger, 48 Cal. 259.

⁴ 2 Sugden on Powers, 497; 2 Perry on Trusts, § 785; Dike v. Ricks. Cro. Car. 395; Doe v. Martin, 4 Thomp. & R. 39; Hougham v. Sandys, 2 Sim. 95; Culpepper v. Ashton, 2 Ch. Cas. 221; Cox v. Chamberlain, 4 Ves. 631; Burgoyne v. Fox, 1 Atk. 475. It is not necessary that a deed should be first set aside in equity where a deed is executed under a power by a donee, having only a life estate with power to dispose of the fee in case of necessity or actual need. The deed may be assailed in ejectment: Scheidt v. Crecelius, 94 Mo. 322; 4 Am. St. Rep. 384.

placed upon powers. Where the condition is precedent, it must be performed, else no sale by virtue of the power can be upheld.¹ Where the condition of a deficiency of personal assets is attached to a power to sell to pay debts, the deficiency must exist or the power cannot be exercised.² Where the executors are to sell by the terms of the power, if in their opinion it shall become necessary to accomplish certain ends, the conveyance is conclusive, and the necessity for the execution of the power need not be shown.³ A testator, after directing his executors to sell his personal estate, empowered them to sell and dispose of his real estate; he directed them, after they had converted his estate into money, to invest the proceeds and pay the interest annually to his wife, and "at and after his wife's decease, he gives and bequeaths to his son all the principal sums of money and security in the hands of his executors"; his wife and two others were named as executors; one of the executors renounced, and after the death of the widow, the surviving executor sold the real estate; it was held that the object of the testator in creating the power was to make a provision for his wife, and therefore it ceased at her death, and the heir at law was entitled to the lands.⁴ A power in a will to sell real estate fails, when the objects for which it was given cannot be attained.⁵ Where the condition annexed to a power of

¹ *Mason v. Martin*, 4 Md. 125; 2 Sugden on Vend. and Pur. 48; Hill on Trustees, 178.

² *Roseboom v. Mosher*, 2 Denio, 61; *Bloodgood v. Bruen*, 2 Bradf. 8; *Graham v. Little*, 5 Ired. Eq. 407.

³ *Roseboom v. Mosher*, 2 Denio, 61; *Rendlesham v. Meux*, 14 Sim. 249. And see *Minot v. Prescott*, 14 Mass. 495; *Penniman v. Sanderson*, 13 Allen, 193; *Coleman v. McKinney*, 3 Marsh. J. J. 251; *Hamilton v. Crosby*, 32 Conn. 342; *Silverthorn v. McKinster*, 12 Pa. St. 67; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Graham v. Fetts*, 53 Miss. 307.

⁴ *Jackson v. Jansen*, 6 Johns. 73.

⁵ *Sharpsteen v. Tillou*, 3 Cow. 651; *Penny v. Cook*, 19 Iowa, 538; *Ward v. Barrows*, 2 Ohio St. 241. Where a sale is made under a power to pay debts after a great lapse of time, the purchaser should see to the application of the purchase money: *Stroughill v. Anstey*, 1 De Gex, M. & G. 635. But see *Sabin v. Heape*, 27 Beav. 553.

sale is subsequent, the power is not affected by a nonperformance of the condition.¹

§ 453. Trust deed becoming void on happening of contingency. — If a deed is made to certain persons to hold the land conveyed in trust for a purpose specified in the deed, and it is provided that in case the trustees should declare by resolution that the objects of the trust were found to be impracticable, the interest held by the trustees shall end, and the land shall revert to the grantor, the trust deed on the happening of the event becomes void, and the right of the grantor to the land becomes absolute.² If a tract of land and the buildings thereon are so conveyed for the purpose of establishing and maintaining a school, and if the building is destroyed by fire and the loss paid to the trustees, and the trustees after the fire declare that the design to establish and maintain a school has proved unsuccessful, and convey the premises to the grantor, he is also entitled to the money received by virtue of the policy of insurance.³

¹ Perry on Trusts, § 785; Hill on Trustees, 178.

² Hawes v. Lathrop, 38 Cal. 493.

³ Hawes v. Lathrop, 38 Cal. 493. "The trustees," said Mr. Justice Rhodes in delivering the opinion of the court, "held the fund in their fiduciary, and not in their private, capacity. The persons to whom they paid the larger part of the money had made donations to the trustees for the benefit of the school, but without any conditions, and they had neither a legal nor equitable claim to the fund. Nor did any claim exist in favor of the persons to whom portions of the fund were paid on account of a loss of furniture sustained by one, or a personal injury sustained by the other. Upon the passage of the resolution referred to, the title to the real estate reverted to the plaintiff, and the trustees had no further duties to perform in maintaining the school; and clearly it would be unnecessary, and not within the scope of their duties, to expend any further sum of money for that purpose. The duties of the defendants as trustees having terminated upon the adoption of the resolution, it became their duty to pay over to the person entitled to it, the insurance money in their hands. It is not and could not be claimed that the defendants are entitled to it; it could not be claimed on behalf of the school, for that no longer existed; and we are unable to see how any one except the plaintiff can make out a plausible claim to it. Had the building, with the addition, remained upon the lot at the time of the adoption of the resolution, it would have vested in the plaintiff; and

§ 454. **Conduct of the sale.**—If assignees for the benefit of creditors make declarations which operate as a prevention of competition at a sale of trust property, and the property is sacrificed thereby, the sale may be set aside at the instance of the beneficiary who has sustained injury from this cause.¹ They have no right to place unnecessary conditions and restrictions upon the sale, which would prevent the fullest price being obtained;² but they may propose conditions that are reasonable.³ Where the trustees have a beneficial interest in the trust property, they may execute a conveyance with full covenants.⁴ But

had the trustees expended the insurance money in rebuilding, before the adoption of the resolution, the new building would have reverted to the plaintiff with the lot; and it would seem just and equitable that the plaintiff should be entitled to the insurance money remaining in the hands of the trustees when the design for the school failed. It represented in their hands the insured building. Had the deed made it the duty of the trustees to keep the building insured, and in case of a loss, to appropriate the insurance money to the erection of another building, there would be no difficulty in holding that, as between the parties to the deed, the money would in equity be treated as land. The trustees did not exceed their duty in effecting the insurance, and it would have been their duty, had not the project for the maintenance of the school failed, to have rebuilt; but they not having rebuilt, and having determined that it was impracticable to maintain the school, the money stands in the stead of the building, and in equity vested in the plaintiff, upon the termination of the trust, in the same manner as would the building, had they expended the money in the erection of a building. The plaintiff has not waived his claim to the money by the acceptance of the deed from the trustees with knowledge of the insurance, the loss and the payment of the insurance money. That instrument, considered as a conveyance, had no effect upon the title, but the operative portion of the instrument was the resolution of the trustees that the design to maintain a school had proved unsuccessful, for upon the adoption of the resolution the trust deed became void, and the title reverted to the plaintiff. Until the resolution was adopted (and there is no evidence of its adoption, except that afforded by the deed), the plaintiff was entitled neither to the land nor the money."

¹ *Goodwin v. Mix*, 38 Ill. 115. And see *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 416; *Dance v. Goldingham*, 8 Law R. Ch. App. 902.

² *Wilkins v. Frye*, 2 Rose, 375; *Downs v. Grazebrook*, 3 Mer. 208; *Dance v. Goldingham*, 8 Law R. Ch. App. 902; *Falkner v. Equitable Society*, 4 Drew. 352.

³ *Hobson v. Bell*, 2 Beav. 17.

⁴ *Staines v. Morris*, 1 Ves. & B. 12; *Stephens v. Hotham*, 1 Kay & J. 580.

otherwise any covenants except against their own acts are unwarranted.¹ Formerly, the practice was to insert in the granting clause of a trustee's deed the words "bargained and sold," merely; the word "grant" was supposed to imply a covenant and hence was omitted, but the caution seems unnecessary.²

§ 455. Who should execute the deed.—Where the legal title is in the trustees, they have the sole power to contract.³ Therefore a trustee cannot transfer his legal estate by the execution of a deed that purports to convey only the right, title, and interest of the *cestui que trust* in the trust property.⁴ Where a full power to sell real estate

¹ *Page v. Broom*, 3 Beav. 36; *White v. Foljambe*, 11 Ves. 345; *Copper Mining Co. v. Beach*, 13 Beav. 478; *Onslow v. Londesborough*, 10 Hare, 74; *Hodges v. Blgrave*, 18 Beav. 405; *Worley v. Frampton*, 5 Hare, 560; *Barnard v. Duncan*, 38 Mo. 170; 95 Am. Dec. 416; *Phillips v. Everard*, 5 Sim. 102; 2 *Perry on Trusts*, sec. 786; *Sugden on Vend. and Pur.* 61.

² *Co. Litt.* 384 a, n. 1.

³ *Sowarsby v. Lacy*, 4 Madd. 79; *Keon v. Magawly*, 1 Dru. & War. 401.

⁴ *Titcomb v. Currier*, 4 Cush. 591. *Wilde, J.*, delivering the opinion of the court, said: "By the will, the testator devised one-eighth part of all his estate, real and personal, to Solomon H. Currier and George Davenport, in trust for his daughter Mary Coffin. The question is, what title, if any, passed by the deed of Currier and Davenport to Haskell. By that deed the grantors conveyed, or undertook to convey, 'all the right, title, and interest that the said Mary Coffin had to one-eighth part of all the real estate belonging to Anthony Davenport, late of Newburyport, deceased, as devised to said Mary Coffin by his last will and testament.' Now, as Mary Coffin took only an equitable estate as *cestui que trust*, under the will of her father, we think the legal estate of the trustees did not pass to Haskell by this deed. Nothing was conveyed but the right and title of Mary Coffin. If the words had been used as words of description or designation of the land conveyed, referring for that purpose to the estate of Mary Coffin, or had there been any words which could be so construed as to convey the title of the trustees, the legal as well as the equitable estates would have passed; but there are no such words, and the recital in the deed cannot enlarge or control the words of the grant. If these words were doubtful, the recital might aid in the construction; but they are not; they expressly grant the right and title of Mary Coffin, and nothing more. It may be that such was not the intention of the parties, but the supposed intention of the parties cannot supply a defect, or correct a mistake in the conveyance. Whatever may have been the intention of the parties, we think it clear, that the deed

is contained in a will, and the executor sells in pursuance of the power, the executor or a third person cannot raise the question that the sale was made in fraud of the rights of the *cestui que trust*. An executor reciting in his deed that he was executor, and had received letters testamentary from the probate court, is estopped by such recitals.¹ A will contained this provision: "I hereby appoint my brother, Francisco Casaneuava, my executor of this, my last will, with power to sell, dispose of, and convey all my said property, both real and personal, for the benefit of my said sister, without obtaining any order of any court therefor. And I hereby dispense with the necessity of his giving the bonds required by law for the faithful execution of the trust hereby created." Concerning the proper construction of this clause, the court said: "This language is broad and general, and clearly shows that the intent of the testator was to withdraw his estate from the operation of the probate act, and vest in his executor full power to convert in his own way the estate into cash for the benefit of his sister. Under this will no action was necessary on the part of the probate court in any respect, to render a sale by the executor valid. It not being essential to the validity of the sale that it should be conducted in the statutory mode, the deed to Llaguna is clearly suf-

to Haskell cannot be construed as to convey to him the legal title to the demanded premises." A deed made under a power in a will, will be considered to have been made in execution of the power, although it does not refer in terms to the will: *Scheidt v. Crecelius*, 94 Mo. 322; 4 Am. St. Rep. 384. Where a deed is in proper form and sufficient to convey the grantor's title, if he possessed any, it will, in case he has no title, be considered as an execution of a power of sale vested in him as executor and trustee: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420. Although the grantor supposed himself to be the owner, and the deed to be a transfer of his title, it may operate as an execution of a power of sale: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420.

¹ *Larco v. Casaneuava*, 30 Cal. 560. "In the deed, Francisco Casaneuava recites that he is the executor of his brother, and that he has letters testamentary from the probate court. If, therefore, as claimed, his taking the oath of office and letters was essential to the validity of his acts under the circumstances of this case (a point we do not decide) as against him, those facts are sufficiently shown by the recitals of his deed, which at least he cannot be heard to deny."

ficient to pass the testator's title. It shows upon its face that Francisco Casaneuava acted, in making it, under the will of Louis Casaneuava. He does not pretend to be acting under the orders of the probate court, and hence the validity of the deed is not to be determined by the law of that court. Undoubtedly, where an executor or any other person undertakes to pass title by statutory modes, it must appear that those modes have been followed, or the act will be a nullity; but such is not the case. The party here acts under a will, and the will authorizes the act, and like a power of attorney, is to be looked to and consulted on the question of power, and if found sufficient, the act must be declared valid."¹ Courts will enforce the specific performance of a contract for sale made by trustees where they had power to make the contract, although the power may have terminated before the conveyance.²

¹ Sanderson, J., in *Larco v. Casaneuava*, 30 Cal. 560, 568. See, however, Cal. Code of Civil Procedure, § 1561.

² *Mortlock v. Buller*, 10 Ves. 315. It is not necessary to join the *cestuis que trust* in the suit: *Wakeman v. Rutland*, 3 Ves. 233, 504; *Duffy v. Calvert*, 5 Gill, 487; *Binks v. Rokely*, 2 Madd. 227; *Re Williams' Estate*, 5 De Gex & S. 515; *Keon v. Magawley*, 1 Dru. & War. 401; *Drayson v. Pocock*, 4 Sim. 283; *Cottrell v. Cottrell*, Law R. 2 Eq. 330; *Lloyd v. Griffiths*, 3 Atk. 264. But courts will not enforce a contract of sale where there has been a breach of trust: *Thompson v. Blackstone*, 6 Beav. 470; *Johnston v. Eason*, 3 Ired. Eq. 334; *Ord v. Noel*, 5 Madd. 438; *Dawes v. Betts*, 12 Jur. 709; *Wood v. Richardson*, 4 Beav. 174. Where an agreement has been made that the purchaser may retain a private debt, a sale will not be enforced: *Miltenberger v. Morrison*, 46 Mo. 251; *Thompson v. Blackstone*, 6 Beav. 470. See *Wedgewood v. Evans*, 6 Beav. 600.

CHAPTER XVIII.

FILLING UP BLANKS—ALTERATIONS, ETC.

- § 456. Filling up blanks.
- § 456 a. When deed is void and when not.
- § 457. Parol authority to insert name.
- § 458. Grantor may be estopped.
- § 459. Party executing deed bound.
- § 460. Alteration of deeds.
- § 461. Alteration by a stranger.
- § 461 a. Grantee's title not divested.
- § 462. Material alteration.
- § 462 a. Redelivery of altered deed.
- § 463. Burden of proof.

§ 456. **Filling up blanks.**—All blanks which, when filled up, affect the deed in a material way, must be filled up before execution. The name of the grantee must be inserted in the deed before it becomes the operative deed of the grantor. The general rule is, that an agent has no power to insert the grantee's name in the absence of the grantor, unless he has written authority to do so.¹ A

¹ *Upton v. Archer*, 41 Cal. 85; 10 Am. Rep. 266; *People v. Organ*, 27 Ill. 27; 79 Am. Dec. 391; *Adamson v. Hartman*, 40 Ark. 58; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Wunderlin v. Cadogan*, 50 Cal. 613; *McNab v. Young*, 81 Ill. 11; *Hord v. Taubman*, 79 Mo. 101; *Chase v. Palmer*, 29 Ill. 306; *Whitaker v. Miller*, 83 Ill. 381; *Ayres v. Harness*, 1 Ohio, 368; 13 Am. Dec. 629; *Byers v. McClanahan*, 6 Gill & J. 250; *Preston v. Hull*, 23 Gratt. 600; 14 Am. Rep. 153; *Williams v. Crutcher*, 5 How. (Miss.) 71; 35 Am. Dec. 422; *Cummins v. Cassily*, 5 Mon. B. 74; *Richmond Mfg. Co. v. Davis*, 7 Blackf. 412; *Burns v. Lynde*, 6 Allen, 305; *Ayres v. Probasco*, 14 Kan. 175; *Cross v. State Bank*, 5 Ark. 525; *South Berwick v. Huntress*, 53 Me. 89; 87 Am. Dec. 535; *Graham v. Holt*, 3 Ired. 300; 40 Am. Dec. 408; *Gilbert v. Anthony*, 1 Yerg. 69; 24 Am. Dec. 439; *Mosby v. State of Ark.*, 4 Sneed, 324; *Ingram v. Little*, 14 Ga. 173; 58 Am. Dec. 549; *Stebbins v. Watson*, 71 Mich. 467; *Arguello v. Bours*, 67 Cal. 447; *State v. Matthews*, 44 Kan. 596. But see *Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182; *State v. Pepper*, 31 Ind. 76. In *Burns v. Lynde*, 6 Allen, 305, this question is very fully discussed.

stranger to the grantor's title cannot object that the name of the grantee was inserted after delivery. Proof that the officer who took the acknowledgment of the deed, acting

Chapman, J., in delivering the opinion of the court, says: "The ancient doctrine of the common law, as stated in the authorities cited by the plaintiff's counsel, is not denied. It is stated in Sheppard's Touchstone, 54, as follows: 'Every deed well made must be written; i. e., the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do there withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed.' This doctrine still prevails in England. The case of *Texira v. Evans*, which was tried at *nisi prius*, is cited in *Master v. Miller*, 1 Anstr. 228, in which Lord Mansfield held a contrary doctrine. In that case the defendant, wishing to raise money, had signed and sealed a bond, and placed it in the hands of an agent, with blanks for the sum and the name of the obligee. The agent borrowed the money of the plaintiff, and filled up the blanks with the sum borrowed and the name of the plaintiff. The deed was held good. But in *Hibblewhite v. M'Morine*, 6 Mees. & W. 200, the question arose in respect to a conveyance of railway shares which was required by statute to be by deed. The name of the purchaser had been left blank, and was written by him after the delivery of the conveyance to him. The point was thoroughly argued, and most of the English cases which had any bearing upon it were cited. Upon full consideration, the conveyance was held to be void. The case of *Texira v. Evans* was overruled. Parke, B., remarked that it had been justly questioned by Mr. Preston in his edition of Sheppard's Touchstone, 'as it assumes there could be an attorney without deed.' And he says of the defense in that case, that it is an attempt to make a deed transferable and negotiable like a bill of exchange or an equitable bill, which the law does not permit. In *Davidson v. Cooper*, 11 Mees. & W. 793, the case of *Texira v. Evans* is again referred to, and is declared to be overruled. But the defendant's counsel contend that the English doctrine does not prevail in Massachusetts, New York, and Pennsylvania. It is true that in the latter state the authority of *Texira v. Evans* is adopted, and the case is said to have overruled the authority of Sheppard's Touchstone, Perkins and Coke upon Littleton: *Wiley v. Moor*, 17 Serg. & R. 438; 17 Am. Dec. 696. It has also been adopted in New York in *Wooley v. Constant*, 4 Johns. 54; 4 Am. Dec. 246. In that case a bill of sale of a ship had been executed, leaving blanks for the recital of the register; and these were filled up after the delivery, by consent of parties. It was held to be valid, on the authority of *Texira v. Evans*. But the action was trover for the ship; and the court remarked that the bill of sale was perfectly competent with the blank in it to pass the property. The same case was again cited as authority in *Ex parte Kerwin*, 8 Cowen, 118, where the bond would not have been valid without filling the blanks. None of the cases decided by this court adopt the authority of *Texira v. Evans*, though some of them give some

as the grantor's agent, inserted the name of the grantee in the deed, and then delivered it to the grantee, obviates the objection that at the time it came from the grantor's

countenance to its doctrines. In *Smith v. Crooker*, 5 Mass. 538, a treasurer had made a bond in which the name of a surety had been left blank, and after delivery it was filled up. The bond was held good on the authority of several ancient cases, the fact being specially noticed that the alteration was immaterial. In *Hunt v. Adams*, 5 Mass. 358, 4 Am. Dec. 68, the instrument in question was a promissory note, not under seal, and therefore the question did not arise. The immaterial word 'year' had at first been omitted, and was afterward inserted. But Parsons, C. J., in giving the opinion, cited the authorities relating to deeds, which he had before cited in *Smith v. Crooker*, and also said that in customhouse bonds it was the practice to leave a blank for the amount of the duties when ascertained, to be filled after delivery, the obligors being considered as consenting that the blanks shall be thus filled up. The case of *Warring v. Williams*, 8 Pick. 322, decides that where an instrument was signed by several parties, and afterward altered by the addition of a seal, and the interlineation of the words 'jointly and severally,' a party to the instrument who was present, and consenting to the alteration, would be bound by it, though the others were not bound. But in the very next case of *Warring v. Williams*, 8 Pick. 326, which was an action brought against another party to the same instrument, it was held that a signature in blank does not authorize anything to be written over it beyond a simple contract, and that authority to affix a seal requires a power of attorney under seal. *Parker v. Hill*, 8 Met. 447, merely decides that a ratification of the delivery of a deed may be proved by the acts and declarations of the grantor, and that his declarations made to a person who is not a party to the instrument are admissible in evidence. The editors of the American edition of the Exchequer Reports, in a note to *Hibblewhite v. M'Morine*, cite some of the above cases, and also the case of *Adams v. Frye*, 3 Met. 103, as adopting the doctrine that blanks left in a deed may be filled by consent of parties after delivery. But the case of *Adams v. Frye* relates altogether to a different point. The alteration there considered was not the filling of a blank by consent, but procuring a person to subscribe his name as a witness after delivery, and without consent. The court held that it would not avoid the deed unless fraudulently done. . . . When the paper was delivered it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing or sealing. If such an act can be done under a parol agreement, in the absence of the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by deed. We do not think such a change of the ancient common law has been made in this commonwealth, or that the policy of our legislation favors it, or that sound policy would dictate such a change. Our statutes which provide for the conveyance of real estate by deed, acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds, are evidently based on

hands no person was named in it as grantee.¹ Where a married woman is unable to delegate a power, she cannot authorize another to fill up blanks and deliver the deed.²

§ 456 a. When deed is void and when not.—Where the signature of the president of a corporation, together with the attachment of the corporate seal, was procured to a blank deed by false representations, and subsequently a description of lands not sold, nor authorized to be sold, was inserted in the deed, the deed was held to be void, and it was also held that the mortgagee of the grantee, who took without notice, acquired no interest, and no estoppel rested on the company preventing it from showing the facts.³ Where a deed with place for the insertion of the name of the grantee left unfilled, is executed and acknowledged, and subsequently the blank is filled contrary to the instructions of the grantor, and to his injury, with the name of a person whom the grantor did not intend should be the grantee, with full knowledge on the

the ancient doctrines of the common law respecting the execution of deeds; and a valuable and important purpose which these doctrines still serve is, to guard against mistakes which are likely to arise out of verbal arrangements, from misunderstanding and defect of memory, even where there is no fraud. The present case shows how dangerous the contrary doctrine would be. Mary Burns states in her bill that the verbal agreement made between her and the defendant was, that her interest in her husband's land should be held to indemnify the persons who should become bail for his appearance at court, and for no other purpose, and that the deed was filled up as an absolute conveyance, contrary to this agreement. She makes oath to the truth of these allegations, and it is to be presumed that she believes them to be true. The defendant offered to prove the contrary; and probably he would have been a witness to prove his statement. It is to be presumed that he so understood the agreement. If this method of executing deeds is sanctioned, it will follow that though the defendant has a regularly executed deed, yet it remains to be settled by parol evidence whether he ought to have been the grantee, what land should have been described, whether the deed should have been absolute or conditional, and if conditional, what the terms of the condition should have been. To leave titles to real estate subject to such disputes would subject them to great and needless insecurity."

¹ *McNab v. Young*, 81 Ill. 11.

² *Drury v. Foster*, 2 Wall. 24; *Burnside v. Wayman*, 49 Mo. 356.

³ *Vaca Valley etc. R. R. Co. v. Mansfield*, 84 Cal. 560.

part of the latter, the deed is void both as to such substituted grantee and to those having notice of the fraud.¹ But a grantor who has conferred authority cannot question the title of one whose name is inserted before revocation of the authority, and who became a purchaser for value without notice.² So, if the name of the grantee is inserted after execution and acknowledgment, but before delivery, and the grantor delivers the deed or directs its delivery, he adopts the deed and it becomes effectual.³

§ 457. **Parol authority to insert name.**—It is held in some cases that where a deed is regularly executed in all other particulars, but a blank is left for the insertion of the name of the grantee, and in this condition is put in the hands of a third person, with authority by parol merely, from the grantor to fill up the blank in his absence, and deliver the deed to the person whose name is inserted in the deed as grantee, the deed, when filled out and delivered, is a valid deed.⁴ In Wisconsin, it is held that where a grantor has fully executed and acknowledged a deed, except that the name of the grantee is not inserted, but has left the deed with A for delivery to B, who has agreed to buy the land, upon the payment of the purchase price, the grantor may authorize A to insert the

¹ *State v. Matthews*, 44 Kan. 596.

² *McCleery v. Wakefield*, 76 Iowa, 529.

³ *Lockwood v. Bassett*, 49 Mich. 546. See, also, *Duncan v. Hodges*, 4 McCord, 239; 17 Am. Dec. 734.

⁴ *Field v. Stagg*, 52 Mo. 534; 14 Am. Rep. 435; *Swartz v. Ballou*, 47 Iowa, 188; 29 Am. Rep. 470; *Clark v. Allen*, 34 Iowa, 190; *Vought's Executors v. Vought*, 50 N. J. Eq. 177; *Jennings v. Jennings*, 24 Or. 447; *Cribben v. Deal*, 21 Or. 211; 28 Am. St. Rep. 746; *Shirley v. Burch*, 16 Or. 83; 8 Am. St. Rep. 273; *McQuie v. Peay*, 58 Mo. 56; *Otis v. Browning*, 59 Mo. App. 326; *Allen v. Withrow*, 110 U. S. 119; *Devin v. Himer*, 29 Iowa, 297; *McClain v. McClain*, 52 Iowa, 272; *McCleery v. Wakefield*, 76 Iowa, 529; *Ellis v. Wait*, 4 S. D. 454; *Ragsdale v. Robinson*, 48 Tex. 379; *Nelson v. McDonald*, 80 Wis. 605; 27 Am. St. Rep. 71; *Bridgeport Bank v. New York & N. H. R. R. Co.*, 30 Conn. 231; *Cox v. Manvel*, 50 Minn. 87; *State v. Young*, 23 Minn. 551. And see *Burnside v. Wayman*, 49 Mo. 356; *McDonald v. Eggleston*, 26 Vt. 161; 60 Am. Dec. 303; *Inhabitants of South Berwick v. Huntress*, 53 Me. 90; 87 Am. Dec. 535; *Speake v. United States*, 9 Cranch, 28.

name of B in the deed as grantee. But when the purchase price is paid, A cannot, at the request of B, insert the name of C as grantee and deliver the deed to him, especially where, before such payment, A has been directed by the grantor not to deliver the deed to any person.¹ In Iowa, the court said the doctrine that authority cannot be conferred by parol rests largely, if not entirely, on the common-law doctrine in relation to instruments under seal; and that as the rules of law as to seals had been abolished in that State, and a seal was unnecessary to the validity of a deed, it would seem that as the reason for the rule had ceased the rule itself should no longer prevail.²

§ 458. Grantor may be estopped.—The grantor may by his acts be estopped from asserting that the deed was not properly executed.³ For instance, where the owners of land execute an instrument, with the intent that the blanks which it contains shall be filled up so that it shall appear on its face to be a valid deed of such land, and by their authority, and in compliance with their directions, the blanks are filled up by a person who delivers the deed in its perfected form to the grantee, who is unaware that the execution of the deed is irregular in any respect, and receives from the grantee the purchase money, and the grantors, after having full knowledge of the delivery of the deed, and the payment of the purchase money, allow the grantee to enter into possession, and make valuable improvements, and lease the premises from the grantee,

¹ *Schintz v. McManamy*, 33 Wis. 299. See *Van Etta v. Evenson*, 28 Wis. 33; 9 Am. Rep. 486; *Vliet v. Camp*, 13 Wis. 198. Authority to a grantee in a deed delivered in blank to fill up the blank with his name may be conferred by parol: *Otis v. Browning*, 59 Mo. App. 326; *Cribben v. Deal*, 21 Or. 211; 28 Am. St. Rep. 746.

² *Swartz v. Ballou*, 47 Iowa, 188; 29 Am. Rep. 470; *Wade v. Bunn*, 81 Ill. 17. And see *Simms v. Hervey*, 19 Iowa, 297; *Owen v. Perry*, 25 Iowa, 412; 96 Am. Dec. 49; *Clark v. Allen*, 34 Iowa, 190. But see *Arguello v. Bours*, 67 Cal. 447; *Upton v. Archer*, 41 Cal. 85; 10 Am. Rep. 266; *McClung v. Steen*, 32 Fed. Rep. 373.

³ *Ragsdale v. Robinson*, 48 Tex. 379. And see *Fisher v. Beckwith*, 30 Wis. 55; 11 Am. Rep. 546; *Pence v. Arbuckle*, 22 Minn. 417.

paying him rent for a term of years, and during all of the time treat the deed as valid and the grantee as owner, they, the grantors, are estopped from claiming that the deed is inoperative, or should be set aside on account of this irregularity in its execution.¹ A grantee or mortgagee, who thus claims that the grantor or mortgagor is estopped, must himself have been careful in the protection of his rights.²

§ 459. Party executing deed bound.—The deed may be valid for some purposes against one grantor who has fully executed it, and inoperative as to others. An action was brought against a grantor for a breach of a covenant of warranty in a deed. The deed also contained a release by the grantor's wife of her right of dower and homestead. It was held that the deed was not invalidated as against the grantor, by evidence that the signature of the wife to the deed was obtained before the description of the land was inserted, or any writing made on the deed, and that she never saw it afterward, and did not redeliver the deed after the description and the other matter had been written in it.³ So where the grantee fraudulently adds the name of the grantor's wife as a party signing the same for the purpose of releasing dower, the deed is not rendered invalid thereby.⁴

§ 460. Alteration of deeds.—It has always been a difficult matter to say exactly what effect an alteration has upon the effect of a deed. The true rule seems to be that if the deed is altered after execution by a party claiming some benefit under it, or by his privity, its operation as an executed contract is not affected. Titles vested by it are not disturbed, but the party making the

¹ *Knaggs v. Mastin*, 9 Kan. 532. And see, also, sec. 465 a.

² *Ayres v. Probasco*, 14 Kan. 175, 190. A party claiming through the grantor cannot object that the name of the grantee was inserted in the deed after delivery: *McNab v. Young*, 81 Ill. 11.

³ *Furnas v. Durgin*, 119 Mass. 501; 20 Am. Rep. 341.

⁴ *Kendall v. Kendall*, 12 Allen, 92.

alteration is deprived of all *future* benefits that he might have derived from it, and cannot enforce any executory obligation contained in it.¹ Thus, if, after the execution of a lease, the lessee fraudulently alters it in some material respect, his future rights under the lease, either to retain possession of the premises or to prevent the entry of the lessor, are lost.² The principle is, that it is the instrument and not the estate which is rendered void. When the title has passed by the delivery of the deed, it is immaterial what becomes of the deed afterward, so far as the title itself is concerned. But if the deed is altered by the party in a material respect, he loses all remedy on any covenants which it may contain.³ It requires, confessedly, a new deed to reconvey the title to the grantor. Its alteration or complete destruction, even with intent to transfer the title, cannot have that effect.⁴ This particular point is discussed at greater length in the chapter on delivery of deeds.⁵ A married

¹ *Bliss v. McIntyre*, 18 Vt. 466; 46 Am. Dec. 165; *Herrick v. Malin*, 22 Wend. 388; *People v. Muzzy*, 1 Denio, 240; *Barrett v. Thorndike*, 1 Greenl. 1; *Briggs v. Glenn*, 7 Mo. 572; *Waring v. Smith*, 2 Barb. Ch. 133; 47 Am. Dec. 299; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Withers v. Atkins*, 1 Watts, 237; *Lewis v. Payn*, 8 Cowen, 71; 18 Am. Dec. 427. And see, also, *Heffelfinger v. Shutz*, 16 Serg. & R. 44; *Nunnery v. Cotton*, 1 Hawks, 222; *Bank of Limestone v. Penick*, 2 Mon. B. 31; *Wright v. Wright*, 2 Halst. 175; 11 Am. Dec. 546; *Hunt v. Adams*, 6 Mass. 519. But a contract or deed may be altered in a material part if done by consent of all interested: *Speake v. United States*, 9 Cranch, 28; *Wooley v. Constant*, 4 Johns. 54; 4 Am. Dec. 246; *Hills v. Barnes*, 11 N. H. 395; *Banington v. Bank of Washington*, 14 Serg. & R. 405; *Stiles v. Probst*, 69 Ill. 382; *Smith v. Weed*, 2 Barb. 54; *Berry v. Haines*, 4 Wheat. 17; *Stephens v. Graham*, 7 Serg. & R. 505; 10 Am. Dec. 485.

² *Bliss v. McIntyre*, 18 Vt. 466; 46 Am. Dec. 165.

³ *Withers v. Atkinson*, 1 Watts, 337. The question whether an alteration is material or not, is one of law for the court and not of fact for the jury: *Keen v. Monroe*, 75 Va. 424; *Burnham v. Ayer*, 35 N. H. 351; *Stephens v. Graham*, 7 S. & R. 505; 10 Am. Dec. 485. It is presumed, if the deed was altered while the grantee had possession of it, that it was done by him: *Bowser v. Cole*, 74 Tex. 222.

⁴ *Stanley v. Epperson*, 45 Tex. 644. And see *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Flinn v. Brown*, 6 S. C. 209; *Wilke v. Wilke*, 28 Wis. 296; *Parker v. Kane*, 4 Wis. 1; 65 Am. Dec. 283.

⁵ See §§ 300-305, *ante*.

woman was the owner of a house and lot in her own right known as lot H., which had been conveyed to her by M. In consideration of the extension of the time of payment of an indebtedness of her husband, she executed a mortgage on this property as collateral security to her husband's bond. In the mortgage her property was not described properly, but was described as lot No. 26. The mistake was discovered shortly after the delivery of the deed, and the attorney for the mortgagees took the instrument to the husband and his attorney for correction. The husband's attorney, in the presence and at the request of the attorney for the mortgagees, without consulting the wife, and without her consent or knowledge, added to the description contained in the mortgage the words, "being the same property conveyed to party of first part by M., by deed recorded in Niagara county clerk's office, in book of deeds, number 117, at page 458," which language was an accurate reference to the record of her deed to lot H. An action was brought to reform the mortgage by altering the description from lot 26 to lot H., and for foreclosure. But the court held that as a material alteration had been made in the conveyance after its execution and delivery, without the knowledge or consent of the mortgagor, for the benefit of the mortgagees, the action could not be sustained. By this alteration the effect of the mortgage was vitiated and destroyed so as to render it incapable of being enforced.¹ If, after the delivery of a deed, an alteration is made in the description of one tract, this

¹ *Marcy v. Dunlap*, 5 Lans. 365, and cases cited. "The modern cases all hold," said Johnson, J. (p. 369), "that if the alteration is the act of a mere stranger, while the deed is out of the possession of the grantee or mortgagee, and without his knowledge or consent, it does not work a destruction of it. But if an alteration has been made without the consent of the party against whom the instrument is sought to be enforced, either by the plaintiff who brings his action upon it, or by some other person while the instrument was in the possession or custody of the plaintiffs, such alteration will discharge the original instrument, without substituting any new contract or obligation in its place. This is the rule as it is now settled by many adjudged cases, and the mortgage in question falls clearly within it."

will not affect the validity of the deed as to the other tracts described in the deed.¹ But after the execution of a mortgage the officer taking the acknowledgment cannot alter the description of the property without the assent of the mortgagor, even if the alteration causes the description to conform to the contract between the parties, as it was understood by the officer.² Although in the case last cited, it appeared that a purchaser had bought the note and mortgage at a large discount, and with full notice to his agent of the character of the transaction, and hence could not claim to be a *bona fide* purchaser, yet the court expressed the opinion that even a *bona fide* purchaser could not enforce the mortgage, because, in fact, the mortgagor had never executed it.³ If, after the execution and delivery of a mortgage, the mortgagee alters it by increasing the amount secured, and by inserting an additional obligation without the knowledge or consent of the mortgagor, the mortgage is rendered void as between the parties. It cannot be enforced as security for the payment of any part of the indebtedness.⁴ If the mortgage has been executed to secure money advanced to pay off a prior mortgage upon the same land, and if an alteration has been accidentally or innocently made by the mortgagee, he may be subrogated to the rights of the prior mortgagee. But if, after execution and delivery, he makes a material alteration, injuriously affecting the rights of the mortgagor, he cannot have the benefit of the application of this equitable doctrine of subrogation.⁵ A deed was executed to a son of a person and to a grandson of the same name

¹ Burnett v. McCluey, 78 Mo. 676.

² Pereau v. Frederick, 17 Neb. 117.

³ Pereau v. Frederick, 17 Neb. 117.

⁴ Johnson v. Moore, 33 Kan. 90. But where all parties consent, see Collins v. Collins, 51 Miss. 311; 24 Am. Rep. 632.

⁵ Johnson v. Moore, 33 Kan. 90; Bowser v. Cole, 74 Tex. 222; Lemay v. Johnson, 35 Ark. 225; Russell v. Reed, 33 Kan. 90; Pereau v. Frederick, 17 Neb. 117; Anderson v. Bellenger, 87 Ala. 334; 13 Am. St. Rep. 46; Cutler v. Rose, 35 Iowa, 456; McIntyre v. Velt, 153 Pa. St. 350; McRaven v. Crisler, 53 Miss. 542; Meyer v. Huneke, 55 N. Y. 412; Elbert v. McClelland, 8 Bush, 577; Marcy v. Dunlap, 5 Lans. 365.

as his own, excepting the addition of a middle initial letter. Both of the grantees were minors. The father, who held the custody of the deed, erased after his son's death the latter's name from the deed; he also erased the middle initial letter in the name of his grandson, and placed the deed on record. By this alteration the deed would show a conveyance to himself. The erasure was held to be a forgery. Hence, neither the legal nor the equitable title of the real grantees was affected by such altered deed.¹

§ 461. Alteration by a stranger.—The rule just stated is founded on the reason that it would be highly imprudent to allow one of the parties the privilege of making a material change in the deed or executory contract without the other's permission. But when the alteration is made by a stranger without the procurement of one of the parties, the reason for the rule ceasing, the rule itself ceases. Hence, no injury results if the alteration in the deed or contract is made not by the party or by his privity, but by a stranger.² But in England, it seems that although the material alteration is made by a stranger, the legal effect is the same as when made by a party.³ If, without the grantee's consent, and through

¹ *Pry v. Pry*, 109 Ill. 466.

² *Rhoads v. Frederick*, 8 Watts, 448; *Nichols v. Johnson*, 10 Conn. 193; *Robertson v. Hay*, 91 Pa. St. 242; *Rees v. Overbaugh*, 6 Cowen, 746; *Lee v. Alexander*, 9 Mon. B. 25; 48 Am. Dec. 412; *Bigelow v. Stilphen*, 35 Vt. 521; *John v. Hatfield*, 84 Ind. 75; *Winter v. Pool*, 100 Ala. 503; *Orlando v. Gooding*, 34 Fla. 244; *Anderson v. Bellenger*, 87 Ala. 334; 13 Am. St. Rep. 46; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498; *Moore v. Ivers*, 83 Mo. 29. An alteration in the middle initial of the name of the grantor is immaterial: *Banks v. Lee*, 73 Ga. 25. Changing the amount of the consideration is immaterial: *Vose v. Dolan*, 108 Mass. 155; 11 Am. Rep. 331; *Murray v. Klinzing*, 64 Conn. 78; *Cheek v. Nall*, 112 N. C. 370; *Belden v. Seymour*, 8 Conn. 304; 21 Am. Dec. 661. But altering the description so as to include more land is a material alteration: *Johnson v. Moore*, 33 Kan. 90. And see *Williams v. Moseley*, 2 Fla. 304; *Medlin v. Platte Co.*, 8 Mo. 235; 40 Am. Dec. 135; *Barrington v. Bank of Washington*, 14 Serg. & R. 405; *Cutts v. United States*, 1 Gall. 69.

³ *Davidson v. Cooper*, 11 Mees. & W. 778, 800; 13 Mees. & W. 343; *The Bank of Hindostan v. Smith*, 36 Law J. N. S. C. P. 241. But see *Hutchins v. Scott*, 2 Mees. & W. 809.

no fraud or negligence attributable to him, an additional name is inserted after that of the grantee, subsequently to the execution of the deed, the grantee does not lose any rights, and no title is conferred on the person whose name was so inserted, or his grantees.¹

§ 461 a. **Grantee's title not divested.**—While the language used in many of the decisions, taken in its broadest sense, would indicate that a material alteration by the grantee of a deed destroys it, yet it should be borne in mind that it is the *deed*, and not the title, that is destroyed. The deed may be rendered invalid by such alteration, so that no right may be founded on it as such; but when the deed has become effective as a conveyance, the title can only be transferred by him by a reconveyance, or in some other mode required by law. When title has once vested, a material alteration in the deed, made by the grantee, will not deprive him of his title, and revest it in the grantor.² The rule is clearly stated by Mr. Justice Sewall: "In executory contracts, provable by written instruments, the remedy is sometimes lost by the loss of the evidence, and bonds and notes which have been altered in a material part by the obligee or payee are no longer proof of an obligation or promise which, when given by the party charged, was expressed in other words than the instrument adduced against him. This rule might possibly, though I doubt it, be extended in strictness, even at the present day, to alterations, wholly im-

¹ John v. Hatfield, 84 Ind. 75.

² Bliss v. McIntyre, 18 Vt. 466; 46 Am. Dec. 165; Lewis v. Payn, 8 Cow. 71; 18 Am. Dec. 427; Hatch v. Hatch, 9 Mass. 307; 6 Am. Dec. 67; Woods v. Hilderbrand, 46 Mo. 284; 2 Am. Rep. 513; Ransier v. Vanorsdol, 50 Iowa, 130; Dana v. Newhall, 13 Mass. 498; Wallace v. Harmstead, 44 Pa. St. 492; Fletcher v. Mansur, 5 Ind. 267; Alexander v. Hickox, 34 Mo. 496; 86 Am. Dec. 118; Chessman v. Whittemore, 23 Pick. 231; Burnett v. McCluey, 78 Mo. 676; Coit v. Starkweather, 8 Conn. 289; Barrett v. Thorndike, 1 Me. 73; Jackson v. Jacoby, 9 Cow. 125; Jackson v. Gould, 7 Wend. 364; Miller v. Gilleland, 19 Pa. St. 119; Herrick v. Malin, 22 Wend. 388; Smith v. McGowan, 3 Barb. 404; Rifener v. Bowman, 53 Pa. St. 313; Withers v. Atkinson, 1 Watts, 236; Kendall v. Kendall, 12 Allen, 92; McIntyre v. Velte, 153 Pa. St. 350.

material, if made at the instigation of the party entitled by the instrument, although it was done innocently, and to no injurious purpose. But these rules have not the same operation where a title in real estate is in question. The canceling of a deed will not divest property which has once vested by a transmutation of possession. A man's title to his estate is not destroyed by the destruction of his deeds."¹ An alteration in the name of the grantee, so that it appears the deed was made to another than the true grantee, is a forgery, and such deed cannot affect the title of the true grantee.² But if the grantee fraudulently alters his deed in a material respect, he cannot use it for the purpose of enforcing its covenants.³ Where a deed is fully executed and acknowledged, but containing the name of no grantee, is left with a person to be delivered to another, who has contracted for the purchase of the land, it is competent for the grantor to authorize the depository to insert the name of such purchaser; but he has no power, upon payment to him of the price, and at the request of the purchaser, to insert the name of another as grantee, and deliver the deed to him, especially so where the grantor has given instructions not to deliver the deed to any person.⁴

¹ In *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67.

² *Pry v. Pry*, 109 Ill. 466.

³ *Wallace v. Harmstead*, 15 Pa. St. 462; 53 Am. Dec. 603; *Sherwood v. Merritt*, 83 Wis. 233; *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Herrick v. Malin*, 22 Wend. 388; *Hollingsworth v. Holbrook*, 83 Iowa, 151; 20 Am. St. Rep. 411; *Basford v. Pearson*, 9 Allen, 387; 85 Am. Dec. 764; *Arrison v. Armstead*, 2 Pa. St. 191; *Bliss v. McIntyre*, 18 Vt. 466; 46 Am. Dec. 165; *Briggs v. Glenn*, 7 Mo. 572; *McIntyre v. Velte*, 153 Pa. St. 350; *Withers v. Atkinson*, 1 Watts, 236.

⁴ *Schentz v. McManamy*, 23 Wis. 299. Said Lyon, J.: "It may be said that it is quite immaterial to the plaintiff whether he conveys the lot to the defendant or to his sister, so long as he receives the agreed price therefor. This may be true, and yet the plaintiff has an undoubted right to determine for himself to whom he will convey his land. He may be willing to convey to one person for a given price, but his right to refuse to convey to another person for the same price is undoubted. He may contract to convey to A, and yet be under no legal obligation to convey to B, in the same terms, even though A may desire that he should do so." The rule announced in some States is that an alteration in a deed,

§ 462. **Material alteration.**—To have the effect of rendering the deed nugatory, the alteration must be in some material respect.¹ Thus, a deed of trust had been made by Wilson Lindley, and a sale had under the trust deed. In copying the deed of trust into the deed made by the trustee in pursuance of the sale, it appeared that the name *James Wilson* had been written in that part of the trust deed so copied, granting the power of sale, but the name *James* had been erased, and the proper name *Wilson* had been inserted in a different handwriting from that in the rest of the deed. The court held that it was apparent that there had only been a clerical error in copying, and that the alteration did not vitiate the deed.² A deed, after describing a tract of land as consisting of eighty acres, proceeded that “so soon as the numbers of

even if it be immaterial, will nullify it: *Vanauken v. Hornbeck*, 14 N. J. L. 178; 25 Am. Dec. 509; *Hunt v. Gray*, 35 N. J. L. 227; 10 Am. Rep. 232; *Den v. Wright*, 7 N. J. L. 175; 11 Am. Dec. 546. See *Plyler v. Elliott*, 19 S. C. 257; *Vaughan v. Fowler*, 14 S. C. 355; 37 Am. Rep. 731; *Powell v. Pearlstine*, 43 S. C. 403. A deed materially altered by the grantee cannot be used by him for any affirmative advantage: *Stoner v. Ellis*, 6 Ind. 152; *Wallace v. Harmstead*, 15 Pa. St. 462; 53 Am. Dec. 603; *Burnham v. Ayer*, 35 N. H. 351; *Robbins v. Magee*, 76 Ind. 381. And see *Newell v. Mayberry*, 3 Leigh, 250; 23 Am. Dec. 261; *Chesley v. Frost*, 1 N. H. 145; *Batchelder v. White*, 80 Va. 103; *Babb v. Clemson*, 10 S. & R. 419; 13 Am. Dec. 684; *Alexander v. Hickox*, 34 Mo. 496; 86 Am. Dec. 118.

¹ *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219. And see *Smith v. Crooker*, 5 Mass. 538; *Langdon v. Paul*, 20 Vt. 217; *Coit v. Starkweather*, 8 Conn. 289; *Goodenow v. Curtis*, 33 Mich. 505. An immaterial alteration will not vitiate the deed: *Stanley v. Epperson*, 45 Tex. 644; *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Robertson v. Hay*, 91 Pa. St. 242; *Winter v. Pool*, 100 Ala. 503; *Burnham v. Ayer*, 35 N. H. 351; *Krouskop v. Shontz*, 51 Wis. 204; 37 Am. Rep. 817; *Murray v. Klinzing*, 64 Conn. 78; *Gordon v. Sizer*, 39 Miss. 805; *Vose v. Dolan*, 108 Mass. 155; 11 Am. Rep. 331; *Commonwealth v. Emigrant Sav. Bank*, 98 Mass. 12; 93 Am. Dec. 126; *Bigelow v. Stilphen*, 35 Vt. 521; *Solon v. Williamsburgh Sav. Bank*, 144 N. Y. 119; *Brooks v. Allen*, 62 Ind. 401; *State v. Dean*, 40 Mo. 464; *Western Building Assn. v. Fitzmaurice*, 7 Mo. App. 283; *McKerson v. Swett*, 135 Mass. 514; *Chessman v. Whittemore*, 23 Pick. 231; *Moote v. Scriven*, 33 Mich. 500; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498; *Gleason v. Hamilton*, 138 N. Y. 353.

² *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219.

the above land are obtained, we agree that they shall be inserted in the deed as our own voluntary act, and the recorder of Marshall county is instructed to do the same for us." The description was subsequently inserted and signed by the recorder, and it was held that the deed had the same effect as a written power of attorney to the recorder to make the alteration in the description.¹

§ 462 a. Redelivery of altered deed.—Where there has been a material alteration in a deed, the deed to the extent of such alteration has become a new deed, and the alteration may be of such a character as entirely to change the original deed. It should, therefore, to give effect to the alteration, be redelivered, and if it has been acknowledged before alteration should be again acknowledged.² It may be presumed from circumstances that a deed or instrument that has been altered was redelivered.³ The grantor may establish the invalidity of the deed by showing that the name of another was inserted as grantee without his consent.⁴

§ 463. Burden of proof.—The decisions are not uniform as to the presumption to be indulged concerning the time at which the alterations were made, whether before or after execution. It has been said that the party who produces the instrument must prove that it is genuine, as the alterations, if any, will be presumed to have been made after the delivery.⁵ As this is purely a

¹ *Harshey v. Blackmarr*, 20 Iowa, 171; 89 Am. Dec. 520.

² *Moell v. Sherwood*, 148 U. S. 21; *Bassett v. Bassett*, 55 Me. 127; *Booker v. Stivender*, 13 Rich. 85; *Sharpe v. Orme*, 61 Ala. 263; *Webb v. Mullins*, 78 Ala. 111; *Houston v. Jordan*, 82 Tex. 352.

³ *Barrington v. Bank*, 14 S. & R. 405; *Speake v. United States*, 9 Cranch, 28; *Wooley v. Constant*, 4 Johns. 54; 4 Am. Dec. 246.

⁴ *Hollis v. Harris*, 96 Ala. 288.

⁵ *Ely v. Ely*, 6 Gray, 439; *U. S. v. Linn*, 1 How. 104; *Montag v. Linn*, 23 Ill. 551. And see *Van Horn v. Bell*, 11 Iowa, 465; 79 Am. Dec. 506; *Acker v. Ledyard*, 8 Barb. 514. See *Havens v. Osborn*, 36 N. J. Eq. 426; *Cox v. Palmer*, 1 McCrary C. C. 431; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; *McAllister v. Avery*, 17 Ill. App. 568; *Galland v. Jackman*, 26 Ill. 79; *Wilson v. Hayes*, 40 Minn. 531; 12 Am. St. Rep.

question of evidence, we will not discuss this topic at length, but call the reader's attention to the subject in treatises on evidence. Mr. Greenleaf says: "If on the production of the instrument, it *appears to have been altered*, it is *incumbent on the party offering it* in evidence to *explain* this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove. If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion. And if it appears in the same handwriting and ink with the body of the instrument, it may suffice. So, if the alteration is against the interest of the party deriving title under the instrument, as if it be a bond or note, altered to a less sum, the law does not so far presume that it was improperly made as to throw on him the burden of accounting for it. And, generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence."¹ But it is said by Mr. Wharton: "A party offers in evidence a written instrument in which there is a manifest alteration; was such an alteration made before or after execution? If after execution, on the principle heretofore stated, it avoids the instrument. But on whom rests the burden in this respect

754; Hill v. Nelms, 86 Ala. 442; Winter v. Pool, 100 Ala. 503; Burgwin v. Bishop, 91 Pa. St. 336; Sisson v. Pearson, 44 Ill. App. 81; Hodge v. Gilman, 20 Ill. 437; Jordan v. Stewart, 23 Pa. St. 244; Morris v. Vanderen, 1 Dallas, 64; Henman v. Dickinson, 5 Bing. 183.

¹ 1 Greenleaf on Evidence (14th ed.), § 564, and cases cited.

to prove the period of alteration? If there is nothing suspicious on the face of the instrument, but the alteration is one which appears to accord with the object of the instrument, then we should say that the burden of proving bad faith in this respect is on the party asserting bad faith. In England, the conclusion was once based upon the assumption that forgery is a crime, and as a crime is not to be presumed, therefore spoliation amounting to forgery is not to be presumed. We need not, however, invoke this principle, which can only have occasional application, to sustain the conclusion here reached. It is sufficient for us to say that when in a written contract *inter vivos*, alterations or interlineations appear, about which alterations or interlineations there is nothing suspicious, the presumption is that they were made before the execution of the instrument; and hence the burden of proving that they were made after execution falls on the assailant of the instrument. The question of spoliation then goes to the jury as a question of fact.”¹

¹ 1 Wharton on Evidence, § 629, and cases cited.

CHAPTER XIX.

ACKNOWLEDGMENT OF DEEDS.

- § 464. Acknowledgment of deeds.
- § 465. Acknowledgment not necessary between the parties.
- § 465 a. Estoppel to deny signature.
- § 466. Statutory provisions.
- § 467. Admissibility of acknowledged deed in evidence.
- § 468. By whom the acknowledgment should be made.
- § 469. Time within which deed may be acknowledged.
- § 470. Qualification of officers.
- § 471. Acknowledgment before an officer *de facto*.
- § 471 a. Certificate authenticating acknowledgment taken out of State.
- § 471 b. Same subject, continued.
- § 472. Temporary appointment.
- § 473. Acknowledgment before deputy.
- § 474. Deputy taking acknowledgment in his own name.
- § 475. Presumption as to appointment of deputy.
- § 476. Officer cannot take acknowledgment of deed in which he is interested.
- § 477. Where the officer taking the acknowledgment is a trustee.
- § 477 a. Degree of interest.
- § 478. Effect of taking acknowledgment by party.
- § 479. Length of acquaintance with person making acknowledgment.
- § 480. Comments on this rule.
- § 481. Omission of date does not invalidate acknowledgment.
- § 482. Omission to state place of taking acknowledgment.
- § 483. When certificate does not show in what State acknowledgment was made.
- § 484. Proof of locality in which officer had jurisdiction.
- § 484 a. Stating name of county.
- § 485. Treating two certificates as one.
- § 486. Presumption that acknowledgment was taken within jurisdiction of officer.
- § 487. Jurisdiction of officer.
- § 488. Comments.
- § 489. Officer if required by statute must attach seal.
- § 490. Where there is no statutory provision.
- § 491. Reference to official seal.
- § 492. Same subject—Contrary decision.
- § 493. Comments.
- § 494. Use of private seal.
- § 495. What will constitute an official seal.

- § 495 a. Officer using another's seal.
- § 496. Signature of officer must be attached to certificate.
- § 497. Certificate of foreign officer, *prima facie* evidence of conformity to law.
- § 498. Taking an acknowledgment is ministerial act.
- § 499. Official character of officer should appear.
- § 500. Certificate *prima facie* evidence.
- § 501. Abbreviations sufficient designation of official character.
- § 502. Proof *aliunde* of official character.
- § 503. Stating name of grantor in certificate.
- § 504. Certificate sufficient, if it shows grantor's name by reference.
- § 505. Presumption that parties use their real names.
- § 506. Acknowledgment in court.
- § 507. Acknowledgment by trustee.
- § 508. Certificate should affirmatively show compliance with statute.
- § 509. Facts showing compliance with statute must be stated.
- § 510. Equivalent words to those mentioned in statute.
- § 511. Illustrations.
- § 512. Omission of the word "personally."
- § 513. Surplusage does not vitiate certificate.
- § 514. Clerical mistakes in certificate.
- § 515. Other illustrations.
- § 516. Omission to state immaterial facts.
- § 517. Comments.
- § 518. Fact must appear that grantor was known to officer or his identity established.
- § 519. Statement that officer is satisfied with identity insufficient.
- § 520. In some States, officer not required to certify to personal identity.
- § 521. Fact of acknowledgment must appear.
- § 522. Equivalent words indicating acknowledgment.
- § 523. Omission of the word "voluntary."
- § 524. Omission of certain words under particular statutes.
- § 525. Presuming an acknowledgment.
- § 526. Comments.
- § 527. Certifying an acknowledgment on same paper on which deed is printed or written.
- § 528. Officer cannot impeach his own certificate.
- § 529. Between the parties the acknowledgment may be impeached for fraud.
- § 529 a. Taking acknowledgment through telephone.
- § 530. Grantee must have knowledge of fraud or of facts sufficient to put him on inquiry.
- § 531. To overcome the certificate the evidence must be clear and convincing.
- § 532. Evidence.
- § 533. Illustrations.
- § 533 a. Further consideration of this subject.
- § 533 b. In some cases considered *prima facie* evidence only.
- § 534. Comments.
- § 535. Innocent grantee protected.

- § 536. Omission of essential word not cured by insertion in record.
- § 537. Acknowledgment through interpreter.
- § 538. Comments.
- § 539. Amendment of certificate—Decisions that such power exists.
- § 540. In Mississippi.
- § 541. In Missouri.
- § 541 a. In Texas.
- § 542. Decisions that such power does not exist.
- § 543. In Illinois.
- § 544. In Virginia.
- § 545. In the Supreme Court of the United States.
- § 546. Comments.
- § 547. Proof by subscribing witness.

§ 464. Acknowledgment of deeds.—In all of the States, statutes exist which provide for the acknowledgment of deeds. Generally, the statute prescribes a particular form with which substantial compliance is necessary. The object of these statutes is to prove the execution of the conveyance, so as to insure its authenticity when presented for registration, and to enable it to be used in evidence without further proof of its execution by the grantor. The certificate of acknowledgment is not essential to the validity of the deed, which is operative, without acknowledgment between the parties. The certificate is simply evidence of the execution of the deed supplying the place of direct proof, and, like all other evidence, should receive a reasonable construction.¹

¹ *Harrington v. Fish*, 10 Mich. 415, 421; *Gray v. Ulrich*, 8 Kan. 112. In the former case a deed was executed and acknowledged in the year 1842, in New York, conveying lands in Michigan. The certificate of the proper clerk was made and attached several years afterward, stating that the deed was executed and acknowledged according to the "existing" law of that State. Objection was made to the admission of the deed in evidence because the clerk's certificate did not state that the deed was acknowledged in compliance with the laws in force at that time. Upon this point, the court, per Martin, C. J., remark: "The second objection relates to the admission of the deed as evidence, without actual proof of its execution. The clerk's certificate, without which—as the deed was executed in another State—it would not be 'authorized to be recorded,' would unquestionably be good were it not for the word 'existing' contained in it; but from the interval of time between the execution of the deed and the date of the certificate—which is December, 1859—it is insisted that the word limits the certificate to the time of such date. Had the certificate been made at or near the time of the deed, no question

§ 465. **Acknowledgment not necessary between the parties.**—The rule which obtains in most of the States is, that as between the parties, no acknowledgment is necessary. The provisions relating to the acknowledgment of deeds are made for the protection and security of creditors and purchasers. But so far as the grantor is concerned, the title vested in him passes by the deed to the grantee as completely as it would if the conveyance had been acknowledged and recorded.¹ “The want of the acknowledg-

would arise, nor would one were the word ‘existing’ stricken out; as, in either case, it would be construed as a certificate of the due and legal execution of the deed according to the laws of the State of New York as they existed at the time of such execution. In my opinion, the occurrence of the word ‘existing’ does not invalidate the certificate, or qualify its construction. I cannot presume that it was inserted as a word of limitation, especially as the clerk could not legally execute any except such as would establish the lawful execution of the deed; but rather that he attempted to comply with the law, and that the word was inadvertently used, or perhaps inadvertently retained in the certificate if a blank form was used, or regarded by the clerk as referring to the time when the deed was executed. The certificate is not an essential part of the deed, nor necessary to its validity. It is only required to authorize its being recorded, and I think it more reasonable, instead of avoiding the registry for the ignorance or inadvertence of the certifying officer, to hold the word ‘existing’ as immaterial, or understand it as though the word ‘then’ preceded it. The certificate being no part of the deed, or of its execution, and not the act of the parties to the deed, should not be construed with technical nicety unless upon imperative necessity. It is *evidence* of the execution of the deed, and like all other evidence should be reasonably construed. I therefore think the deed was properly admitted.”

¹ *Hastings v. Vaughn*, 5 Cal. 315; *Stewart v. Matthews*, 19 Fla. 752; *Gibbs v. Swift*, 12 Cush. 393; *Raines v. Walker*, 77 Va. 92; *Strong v. Smith*, 3 McLean, 362; *Harrison v. McWhirter*, 12 Neb. 152; *Goodenough v. Warren*, 5 Saw. 494; *Brown v. Manter*, 22 N. H. 468; 53 Am. Dec. 223; *Stevenson v. Cloud*, 5 Blackf. 92; *Lessee of Sicard v. Davis*, 6 Peters, 124, 135; *Simpson v. Mundee*, 3 Kan. 172; *Hill v. Samuel*, 21 Miss. 307; *McMahon v. McGraw*, 26 Wis. 614; *Jackson v. Allen*, 30 Ark. 110; *Wark v. Willard*, 22 N. H. 468; *Westhafen v. Patterson*, 120 Ind. 459; 16 Am. St. Rep. 330; *Gordon v. City of San Diego*, 108 Cal. 254; *Grant v. Oliver*, 91 Cal. 158; *Kimmarle v. Houston & T. C. Ry. Co.*, 76 Tex. 686; *Munger v. Baldridge*, 41 Kan. 236; 13 Am. St. Rep. 273; *Missouri Pac. Ry. Co. v. Houseman*, 41 Kan. 300; *Manaudas v. Mann*, 14 Or. 450; *Morse v. Beale*, 68 Iowa, 463; *Stephens v. Williams*, 46 Iowa, 540; *Webb v. Chisholm*, 24 S. C. 487; *Klein v. Richardson*, 64 Miss. 41; *Williams v. Jones*, 95 N. C. 504; *Hogans v. Carruth*, 18 Fla. 587; *Robinson v. Robinson*, 116 Ill. 250;

ment, or of the proof which may authorize the admission of the deed to record, does not invalidate the deed as between the grantor and grantee; and it is good as to all persons who are charged with such notice. The acknowledgment and recording of the deed are provisions which the law makes for the security of creditors and purchasers. They are not essential to the validity of the deed as to the grantor."¹ "An unacknowledged deed passes title equally with one duly acknowledged and certified. Acknowledgment has reference simply to the proof of execution, not to the force of the instrument."²

Lydiard v. Chute, 45 Minn. 277; *Dobbin v. Cordiner*, 41 Minn. 165; 16 Am. St. Rep. 683; *Tidd v. Rines*, 26 Minn. 201; *Saunders v. Blythe*, 112 Mo. 1; *Hannah v. Davis*, 112 Mo. 599; *Bennett v. Shipley*, 82 Mo. 448; *Chandler v. Bailey*, 89 Mo. 641; *Strickland v. McCormick*, 14 Mo. 166; *Harrington v. Fortner*, 58 Mo. 468; *Stevens v. Hampton*, 46 Mo. 404; *Wilson v. Kimmel*, 109 Mo. 260; *Dail v. Moore*, 51 Mo. 589; *Knight v. Leary*, 54 Wis. 459; *Myrick v. McMillan*, 13 Wis. 188; *Musgrove v. Bonser*, 5 Or. 313; 20 Am. Rep. 737; *Moore v. Thomas*, 1 Or. 201; *Chamberlain v. Spargur*, 86 N. Y. 603; *Edson v. Knox*, 8 Wash. St. 642; *Landers v. Bolton*, 26 Cal. 393; *Banbury v. Sherin*, 4 S. D. 88; *Ricks v. Reed*, 19 Cal. 551; *Keeling v. Hoyt*, 31 Neb. 453; *Connell v. Galligher*, 36 Neb. 749; *Cable v. Cable*, 146 Pa. St. 451. Where a deed provides that the grantor possesses the power to revoke it by an instrument under seal, executed and recorded in the manner prescribed for deeds of land, the fact that the statute does not confer express authority on the county clerk before whom the revocation was acknowledged to take the acknowledgment of and record such an instrument will not render it invalid: *Ricketts v. Louisville, St. L. and D. Ry. Co.*, 91 Ky. 221; 34 Am. St. Rep. 176.

¹ *Blain v. Stewart*, 2 Iowa (Clarke), 378, 383, per Stockton, J. But see as to the law in New York, *Chamberlain v. Spargur*, 86 N. Y. 603; 22 Hun, 437.

² *Gray v. Ulrich*, 8 Kan. 112, 122, per Brewer, J. In *Ricks v. Reed*, 19 Cal. 551, 576, Field, C. J., delivering the opinion of the court, said: "Whether the deeds from Wilson to Crosier, and from Crosier to the plaintiffs, were properly acknowledged and recorded or not, is of no consequence. The defendants did not claim under Wilson, and could not invoke the want of such acknowledgment or record for their protection. There is no question as to the due execution of these deeds, and this is all that was necessary to pass the grantor's interest, except as to subsequent purchasers from him in good faith and for a valuable consideration": See, also, *Dole v. Thurlow*, 12 Met. 164; *Hepburn v. Dubois*, 12 Peters, 375. In *Moore v. Thomas*, 1 Or. 201, it is said, per Williams, C. J.: "Assuming, as we must, that these mortgages are unacknowledged and unrecorded in law, we think they are valid as between the parties thereto,

§ 465 a. **Estoppel to deny signature.**—If the name of the grantor is signed to the deed by another, the acknowledgment of the deed by the grantor is an adoption of the signature as his own, and the deed is as valid as if signed originally by the grantor himself.¹ The acknowledgment is tantamount to a public declaration that the signature is that of the grantor, which he is estopped from denying as against an innocent purchaser without notice.² Even when the name of the grantor has been signed to the deed by the grantee, the deed becomes valid by its subsequent acknowledgment and delivery by the grantor.³ Its validity is not founded on the ground of agency or ratification, but on that of adoption. In many cases the distinction would be unimportant, but its importance is seen when it is asserted that the adoption is ineffectual, because an agent cannot contract with himself. Its validity does not rest on the ground of agency at all.⁴

§ 466. **Statutory provisions.**—In some of the States the acknowledgment is an essential part of the execution

and may be enforced by this proceeding against Thomas. True, the invalidity of said mortgages seems to be a legitimate deduction from some of the provisions of the Act of 1849, under which they were made; but when we consider the whole of said act, we think our conclusion is well founded and fully effectuates the object of such legislation. When said mortgages were signed, sealed, and delivered by Thomas to Moore, they were certainly good at common law, and there is no reason to suppose that the design of the registry act was to prevent the operation of a deed so made, or to protect the parties thereto as against each other; but the manifest and exclusive object of such act was to protect third persons from fraud or injury by means of prior secret conveyances. This view corresponds with the judicial construction of the same statute in Iowa from which this was taken, and is amply sustained by other authorities": And see *Musgrove v. Bonser*, 5 Or. 313; 20 Am. Rep. 737.

¹ *Lewis v. Watson*, 98 Ala. 479; 39 Am. St. Rep. 82; *Blaisdell v. Leach*, 101 Cal. 405; 40 Am. St. Rep. 65; *White v. Graves*, 107 Mass. 328; 7 Am. Rep. 38. See, also, § 263, *ante*; *Bartlett v. Drake*, 100 Mass. 174; 1 Am. Rep. 101; *Clough v. Clough*, 73 Me. 487; 40 Am. Rep. 386.

² *Blaisdell v. Leach*, 101 Cal. 405; 40 Am. St. Rep. 65.

³ *Clough v. Clough*, 73 Me. 487; 40 Am. Rep. 386.

⁴ *Clough v. Clough*, 73 Me. 487; 40 Am. Rep. 386. As to acknowledgment of forged deed, see *Chivington v. Colorado Co.*, 9 Col. 597.

of the deed, and a deed is defective without acknowledgment.¹ In Alabama, the code declares a deed must be attested before witnesses, but an acknowledgment of execution before an officer authorized to take it dispenses with necessity of attestation.² Under this provision, it is held that a deed without any subscribing witness, and without acknowledgment before a proper officer, is ineffectual as a transfer of land.³

§ 467. Admissibility of acknowledged deed in evidence.—In most of the States the rule is that a deed duly acknowledged and recorded is admissible in evidence

¹ *Smith v. Hunt*, 13 Ohio, 260, 268; 42 Am. Dec. 201. See, also, *Nellis v. Munson*, 108 N. Y. 453; *Chamberlain v. Spargur*, 86 N. Y. 603; *Black v. Vaughan*, 70 Tex. 47; *Thomas v. Thomas*, 10 Ired. 123; *Phifer v. Barnhart*, 88 N. C. 333.

² Rev. Code Ala. §§ 1535, 1536; Code of 1876, §§ 2145, 2146.

³ *Lord v. Folmar*, 57 Ala. 615; *Bank of Kentucky v. Jones*, 59 Ala. 123; *Hendon v. White*, 52 Ala. 597, 603. In the case last cited the court said: "The sections under consideration can have but one office to perform in this view. They operate an abrogation of the common-law rule, and substitute in its stead the essentials of an alienation of lands. These essentials must be observed, or the alienation is unauthorized and ineffectual. They cannot be esteemed as providing a mere cumulative mode of conveyance, for at common law the mode of conveyance prescribed would be valid and operative, and would have been generally observed. As no conveyances are now in use here which livery of seisin ever attended, the purpose was to require, as indispensable to an alienation of lands, an authentication of the act partaking of the character of the conveyance by which it was done; as the title could pass only by writing, that there must be witnesses to its execution subscribing in writing, or an acknowledgment before an officer of the law authorized to take and certify it. A safeguard against fraud, perjury, and clandestine conveyances is thus provided. Such safeguard is a necessity to the security of titles." See, also, *Stults v. Kohn*, 64 Ala. 186. But such a deed may be treated as an agreement to sell: *Evans v. Richardson*, 76 Ala. 329; *Carpenter v. Hall*, 83 Ala. 171. As to the effect of unacknowledged certificates for lots in a burial ground, where a statute provides that no estate in land of above seven years' duration could pass unless the deed was acknowledged, see *Trustees Catholic Cathedral Church v. Manning*, 72 Md. 116. In some states the statute provides that the deeds of sheriffs and similar officers are not complete until they have been acknowledged: *Adams v. Buchanan*, 49 Mo. 64; *Ryan v. Carr*, 46 Mo. 483; *De Haven's Appeal*, 38 Pa. St. 373; *Clarke v. Tucker*, 6 Vt. 81; *Roads v. Symmes*, 1 Ohio, 315; 13 Am. Dec. 621.

without further proof of execution.¹ The law will presume that the acknowledgment was made at the place and time appearing in the certificate.² In Massachusetts, however, the rule seems to be that a party relying upon a deed made immediately to himself or to the other party, must produce the original deed, or lay a foundation for the admission of secondary evidence; but a certified copy of other deeds from the registry properly acknowledged and recorded, is original evidence in place of the deed itself.³ A deed that is properly acknowledged is entitled

¹ *Carpenter v. Dexter*, 8 Wall. 532; *Clark v. Troy*, 20 Cal. 219; *Hinchliffe v. Hinman*, 18 Wis. 135; *Samuels v. Borrowscale*, 104 Mass. 207; *Young v. Ringo*, 1 Mon. 30; *Landers v. Bolton*, 26 Cal. 405; *Hutchison v. Rust*, 2 Gratt. 394; *Houghton v. Jones*, 1 Wall. 702; *Simpson v. Munde*, 3 Kan. 181; *Doe v. Prettyman*, 1 Houst. 339; *Reed v. Kemp*, 16 Ill. 445; *Ward v. Fuller*, 15 Pick. 185; *Keichline v. Keichline*, 54 Pa. St. 75; 3 Wash. Real Prop. (4th ed.) 322; *Martindale's Conveyancing*, 212; 2 *Greenleaf on Evidence*, § 299, n.; *Mixer v. Bennett*, 70 Iowa, 329; *Simmons v. Havens*, 101 N. Y. 427. A deed may be acknowledged at any time: *Fisher v. Butcher*, 19 Ohio, 406; 53 Am. Dec. 436; *Secrest v. Jones*, 30 Tex. 596; *Lanning v. Dolph*, 4 Wash. C. C. 624; *Shelden v. Stryker*, 42 Barb. 284; 27 How. Pr. 387. In *Hinchliffe v. Hinman*, *supra*, it was contended that the provision of the statute permitting deeds witnessed and acknowledged to be read in evidence without further proof, only applied to a case where the grantor was dead. But the court held that the statute applied to every case.

² *Granniss v. Irvin*, 39 Ga. 22.

³ *Stetson v. Gulliver*, 2 Cush. 498; *Ward v. Fuller*, 15 Pick. 185; *Commonwealth v. Emery*, 2 Gray, 80; *Thatcher v. Phinney*, 7 Allen, 146; *Samuels v. Borrowscale*, 104 Mass. 207. In *Commonwealth v. Emery*, *supra*, the grounds on which these decisions are based are thus stated by Shaw, C. J.: "The rule as to the use of deeds as evidence in this commonwealth is founded partly on the rules of the common law, but, modified to some extent by the registry system established here by statute. The theory is this: That an original deed is in its nature more authentic, and better evidence than any copy can be; that a copy is in its nature secondary; and, therefore, in all cases original deeds should be required, if they can be had. But as this would be burdensome and expensive, if not impossible in many cases, some relaxation of the rule was necessary for practical purposes. The law assumes that the grantee is the keeper of deeds made directly to himself; when, then, he has occasion to prove any fact by such deed, he cannot use a copy, because it would be offering inferior evidence, when in theory of law, the superior is in his own possession or power. It is only on proof of the loss of the original in such case, that any secondary evidence can be received. Our system of

to admission in evidence without proof of the handwriting of the magistrate or officer taking the acknowledgment. The certificate of the officer is *prima facie* evidence of his authority to take the acknowledgment, and of the genuineness of his signature, subject to rebuttal, by evidence showing his want of authority, or the fact that the signature attached was not made by him.¹

conveyancing, modified by the registry law, is that each grantee retains the deed made immediately to himself, to enable him to make good his warranties. Succeeding grantees do not, as a matter of course, take possession of deeds made to preceding parties, so as to be able to prove a chain of title, by a series of original deeds. Every grantee, therefore, is the keeper of his own deed, and of his own deed only. But there is another rule of practice arising from the registry law, and the usage under it, which is, that all deeds before being offered in evidence as proof of title must be registered. The register of deeds, therefore, is an officer of the law, with competent authority to receive, compare, and record deeds; his certificate verifies the copy as a true transcript of the original, and the next best evidence to prove the existence of the deed; though it follows as a consequence that such copy is legal and competent evidence, and dispenses with original proof of its execution by attesting witnesses. In cases, therefore, in which the original in theory of law is not in the custody or power of the party having occasion to use it, the certified office copy is *prima facie* evidence of the original and its execution, subject to be controlled by rebutting evidence. But as this arises from the consideration, that the original is not in the power of the party relying on it, the rule does not apply, when such original is in theory of law in possession of the adverse party; because upon notice the adverse party is bound to produce it, or put himself in such position that any secondary evidence may be given. Should it be objected that upon notice to the adverse party to produce an original, and a tender of the paper in answer to the notice, the party calling for the deed might deny that the paper tendered was the true paper called for; it would be easy to ascertain the identity of the paper by a comparison of the contents of the paper tendered with the copy offered, and by the official certificate which the register of deeds is required to make on the original when it is recorded. This construction of the rule will carry out the principle on which it is founded, to insist on the better evidence when it can practically be had, and allow the secondary only when it is necessary." See, also, *Olark v. Troy*, 20 Cal. 219; *Belcher v. Fox*, 60 Tex. 527; *Holland v. Carter*, 79 Ga. 139; *Payne v. McKinney*, 30 Ga. 83; *Ferris v. Boxell*, 34 Minn. 392; *Eichelberger v. Sifford*, 27 Md. 320; *Brook v. Headen*, 13 Ala. 370; *Strong v. Smith*, 3 McLean, 362.

¹ *Keichline v. Keichline*, 54 Pa. St. 75; *Goddard v. Glonninger*, 5 Watts, 219. It has been held that a deed should not be rejected as evidence for a defect in the acknowledgment, but should be received with instructions to the jury as to its effect in giving notice to third persons:

§ 468. **By whom the acknowledgment should be made.**—Where a party executes a deed in his own right, he is the proper person to acknowledge its execution. The only question as to the person by whom the deed should be acknowledged that can arise, is where the deed is executed by a corporation, or by a person acting in the character of agent or trustee. When a conveyance is executed by a bank and is signed by the president and cashier, it is not necessary that it should be acknowledged by both, but the acknowledgment by the cashier is sufficient, unless it should appear that he had no right to act by himself.¹ And where no statutory provision exists as to the execution or acknowledgment of deeds by a corporation, the officer who affixes the corporate seal is the party executing the deed, within the meaning of the statutes requiring acknowledgment of the deed by the grantor.² In most of the States, forms are prescribed for

Hastings v. Vaughn, 5 Cal. 315. See *Jackson v. Shepard*, 2 Johns. 77; *Strong v. Smith*, 3 McLean, 362. If an instrument is not admissible to show a conveyance of the interest of one of the grantors, because of its failure to show a proper acknowledgment on her part, this fact will not exclude it as a conveyance of the interest of another grantor, whose acknowledgment is proper in form: *Edens v. Simpson* (Tex. Dec. 8, 1891), 17 S. W. Rep. 788.

¹ *Merrill v. Montgomery*, 25 Mich. 73. Says Campbell, J., delivering the opinion of the court: "The mortgage purported to be sealed with the corporate seal, and signed by the president and cashier; but acknowledged by the cashier only. It was held in *Benedict v. Denton*, Walk. Ch. 336, that the corporate seal is presumptive evidence of valid corporate authority. It is the seal which completes the corporate contract, and the acknowledgment is to be made by the person representing the corporation in that act. Presumptively, if the seal is evidence of authority, the cashier, who is usually keeper of the seal, must be the proper person to affix it, and the act or acknowledgment of any other person would be superfluous. The object of acknowledgment is to obtain an official recognition of the person whose act gives the deed its corporate character as an act of the bank. And we think no other acknowledgment was necessary until it should appear he had no right to act by himself."

² *Kelly v. Calhoun*, 95 U. S. 710. As to the sufficiency of a certificate of acknowledgment of an assignment for benefit of creditors by a corporation, see *Epwright v. Nickerson*, 78 Mo. 482. See *Lovett v. The Steam Saw Mill Co.*, 6 Paige, 54; *Merrill v. Montgomery*, 25 Mich. 73; *Hopper v. Lovejoy*, 47 N. J. Eq. 573; *Bowers v. Hechtman*, 45 Minn. 238.

the acknowledgment of deeds by attorneys in fact. It should appear as a general proposition that the attorney executed the deed as the act of his principal.¹ The acknowledgment of an attorney in fact is properly certified when the certificate states, "personally appeared before me, a notary public of said county, A B, by his attorney in fact, C D, known to me to be the person who executed," etc.² Where a sheriff's deed is executed by a deputy sheriff, the latter is the proper person to acknowledge the execution of the deed.³ Concerning the acknowledgment of a tax deed, it is said by Mr. Justice Cole of Wisconsin: "Our statute prescribes no particular form of acknowledgment, and one by the deputy for and in the name of his principal appears to us valid and sufficient."⁴

As to the sufficiency of a certificate of acknowledgment made by an attorney for a corporation, see *Basshor v. Stewart*, 54 Md. 376. A certificate of acknowledgment of a deed of assignment executed by a corporation was held insufficient, which recited that a person named appeared before the officer and "acknowledged that he is president of the within corporation, and that he signed the foregoing deed as its president, and that he has been duly authorized to sign the same by the board of directors of said corporation, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed": *Bennett v. Knowles* (Minn.), 68 N. W. Rep. 111.

¹ *Elwell v. Shaw*, 16 Mass. 42; 8 Am. Dec. 126; *Fowler v. Shearer*, 7 Mass. 19. See *McDaniels v. Flower Brook*, 22 Vt. 274; *Bigelow v. Livingston*, 28 Minn. 57; *North v. Henneberry*, 44 Wis. 506; *Talbert v. Stewart*, 39 Minn. 602; *Frostbury Mut. Bldg. Assn. v. Brace*, 51 Md. 408; *Huey v. Van Wie*, 23 Wis. 613; *McAdow v. Black*, 6 Mont. 601; *Terrell v. Martin*, 64 Tex. 121.

² *Talbert v. Stewart*, 39 Cal. 602. And a certificate of acknowledgment in substantially the same form by an attorney in fact was held sufficient as an acknowledgment of the grantor's deed, in *Bigelow v. Livingston*, 28 Minn. 57. A certificate of acknowledgment reciting that "personally appeared before me, . . . B, by A, one of his attorneys in fact, and who is personally known to me to be the person," etc., is in proper form: *McAdow v. Black*, 6 Mont. 601.

³ *Terrell v. Martin*, 64 Tex. 121. The certificate of acknowledgment in this case was: "Before the undersigned authority personally appeared J. M. Henderson, sheriff of Tarrant county, by W. T. Steele, deputy, to me well known, and acknowledged that he executed the foregoing deed for the purposes and consideration and in the capacity therein set forth and expressed," and the certificate was signed and sealed by the officer. This certificate was held to be in substantial compliance with the law.

⁴ *Huey v. Van Wie*, 23 Wis. 613, 618.

§ 469. **Time within which deed may be acknowledged.**—Unless there is some particular time specified by statute within which a deed is required to be acknowledged, acknowledgment may be made at any time. It is immaterial so far as concerns its admissibility in evidence, whether it is acknowledged before or after suit brought.¹ And the deed may be read in evidence, if acknowledgment is made when it is offered.² In Alabama, a statute provided that a deed should be of no effect against a subsequent *bona fide* purchaser or mortgagor for a valuable consideration without notice, if not acknowledged and recorded within six months after its execution, but otherwise prescribed no period within which an acknowledgment should be made. It was held that the deed might be acknowledged at any time, and that the statute was confined to cases where the rights of such purchaser or mortgagor were involved.³ It is not necessary to the validity of a deed, made by husband and wife, that it should be acknowledged before the same officer, or at the same time and place, or that their acknowledgments should be certified by a single certificate.⁴ When

¹ *Kelly v. Dunlap*, 3 Pa. 136. Says Huston, J: "Our acts of assembly for recording deeds prescribe the mode in which a deed shall be acknowledged or proved, in order that it may be legally recorded; if not so acknowledged or proved, the recording is of no effect; if duly acknowledged or proved, and recorded, 'the copy, certified under the seal of the proper office, which the recorder is required to affix thereto, shall be received in all courts where produced, and are hereby declared and enacted to be as good evidence, and as valid and effectual in law, as the original deeds themselves,' etc. A deed being generally necessary to show title to land, passes with it, and may be required, when the grantor and witnesses are dead; it is generally necessary to exhibit it in all suits respecting that land; and these suits may be with different people and in different courts; it was wise, then, to provide a mode by which the deed could be authenticated, so that it could be read in all suits, in all courts, against all people. Our act of assembly has done so, and as the act makes no difference whether the deed has been acknowledged or proved before or after a particular suit was instituted, so the courts have made none; it is to be 'allowed and read in all courts where produced.' " And see *Fisher v. Butcher*, 19 Ohio, 406; 53 Am. Dec. 436.

² *Pierce v. Brown*, 24 Vt. 165. See, also, *Harrington v. Gage*, 6 Vt. 532.

³ *Johnson v. McGehee*, 1 Ala. 186.

⁴ *Ludlow v. O'Neil*, 29 Ohio St. 181. Speaking of the statute, Welch,

there is a defective acknowledgment and certificate of a wife's signature and assent to the conveyance of a homestead, it is held that she may make a new acknowledgment with intent to cure the defect; and where the acknowledgment is properly made and certified, it will, in the absence of intervening rights of third persons, relate back to the time at which the deed was originally delivered, and no new delivery is required.¹ And as the

C. J., in delivering the opinion of the court, observes: "It nowhere requires that the acknowledgment of a deed by husband and wife shall be made in the presence of each other, or be made at the same time or place. The *first* section requires all grantors, other than married women, to acknowledge the 'signing and sealing' of the deed. The *second* section, as we understand it, simply requires that the wife, 'in addition thereto'—that is, in addition to what is required of other grantors,—shall 'declare' on separate examination, and the contents of the deed being made known to her, that she voluntarily signed, sealed, and acknowledged it, and that she is still content therewith. It no more requires a *simultaneous* acknowledgment by husband and wife than by any two or more grantors. The provision requiring her separate examination is express and explicit. Had it been the legislative intent that the husband should be present at the time of her acknowledgment, it is but reasonable to suppose that there would have been a provision equally express and explicit to that effect. Nothing but a far-fetched implication can ingraft any such meaning upon the statute, and there is no reason or necessity for it to rest upon. The husband can render the wife every needed protection by himself refusing to sign and acknowledge the deed. If she acknowledges it before the husband, it is presented to him with the wife's signature and acknowledgment, and he has only to refuse to acknowledge. If he acknowledges it first, he acknowledges it as a deed, to be executed by them both. Of course, the deed is not binding on her till executed by both, and of course, the certificate must show both that she acknowledged the 'signing and sealing,' and also that she was separately examined and made the declaration required by the statute.

¹ Cahall v. Citizens' Mutual Building Assn., 61 Ala. 232. The court, after speaking of other conveyances, says: "The same rule should be applied to the homesteads. Neither the constitution nor the statutes appoint any particular time within which the wife shall give her assent and signature to the conveyance of the husband, nor does the statute appoint any particular time in which her privy examination and acknowledgment shall be taken and certified. The delivery of the conveyance by the husband may precede or may be subsequent or contemporaneous with the signature and assent of the wife, and her examination and acknowledgment. If it precedes, it is necessarily in its nature, whether so expressed or not, conditional, dependent for its effect and

true date of a deed may always be shown, the fact that the acknowledgment bears date before the deed itself is not a substantial objection to the deed.¹

§ 470. **Qualification of officers.**—The statutes of the various States designate certain persons by whom acknowledgments may be taken. It is not intended to give these statutes in detail, as it would subserve no useful purpose. But it may be worth the while to refer to a few decisions in which statutes of this kind have been construed. In Illinois, a statute provided that acknowledgments might be made before certain officers, among them a “mayor of a city or notary public.” It was held that an acknowledgment before a mayor of a *town*, no such officer being named in the statute, was insufficient.² In Massachusetts, the statute then in force required a deed to be “acknowledged by the grantor before a justice of the peace in this State, or before a justice of the peace or magistrate of some other of the United States, or in any other State or kingdom wherein the grantor or vendor may reside at the time of making and executing the deed.” An American consul at a foreign port was held to be a magistrate, within the meaning of the statute, and authorized as such to take acknowledgments.³ In Vermont,

operation on the subsequent signature and assent of the wife, the privy examination, acknowledgment, and certificate by the proper officer. When these are obtained, the delivery becomes absolute, the conveyance is perfect, and has relation, the rights of third persons not having intervened, to the delivery by the husband: *Johnson v. McGehee*, 1 Ala. 186; *Nelson v. Holly*, 50 Ala. 3; *Hendon v. White*, 52 Ala. 97.”

¹ *Gest v. Flock*, 2 N. J. Eq. (1 Green), 108.

² *Dundy v. Chambers*, 23 Ill. 369. See, also, *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460. An acknowledgment is invalid if not made before an officer authorized to take acknowledgments: *Simpson v. Montgomery*, 25 Ark. 365; 99 Am. Dec. 228; *Baze v. Arper*, 6 Minn. 220.

³ *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344. Chief Justice Shaw delivered the opinion of the court, and remarked: “It is difficult to fix any definite meaning to the word ‘magistrate,’ a generic term importing a public officer, exercising a public authority; it was intended, we think, to use a term sufficiently broad to indicate a class of officers, exercising an authority similar to that of justices of the peace in our own State, or as nearly so as the difference in the forms of their governments

under a provision of the constitution making every judge of the supreme court *ex officio* justice of the peace, throughout the State, it was held that he might take an acknowledgment under a statute conferring this authority upon justices of the peace, and it was not necessary for him in signing the certificate to call himself a justice of the peace.¹ In California, the general designation of any notary public, or any consul of the United States, was held to embrace notaries and consuls of every grade,

and institutions would permit. It was to provide for the execution and acknowledgments of deeds in all foreign countries. It may be remarked, as a circumstance of some consideration, that the acknowledgment is to be before some justice of the peace or magistrate in any other State or kingdom, not of any other State. There is nothing to indicate what kind of magistrate was intended, except the nature of the act to be done, and the connection in which the term is used. The act is a ministerial one; it is to be before a justice of peace or magistrate. The maxim *noscitur a sociis* applies. It must, then, be a ministerial officer, exercising like powers with those of a justice of peace in this commonwealth when acting in his ministerial capacity. Such an officer, we think, is a consul in a foreign country, at least in respect to the persons and interests of the country from which he is sent. An American consul in France derives his authority, in effect, from both governments; he has his commission from the United States, but his *exequatur* from France; and it is, in truth, in virtue of the authority vested in him by the latter, that he exercises any official authority within the territorial limits of the latter: The Belle Corrues, 6 Wheat. 156, n.; 1 Chitty's Common Law, 48. This view is somewhat confirmed by the statute law of the United States (Act of Congress, 1792, ch. 24, § 2), which provides that consuls shall have right, in the posts or places to which they are appointed, of receiving the protests and declarations which masters, etc., who are citizens of the United States, may choose to make there, and also such as any foreigner may choose to make before them relative to the personal interest of any citizen of the United States. The same statute, section 9, provides that the specific enumeration of powers therein expressed shall not be deemed to exclude such others as result from the nature of the office. An officer authorized by the concurrence of both governments to exercise such powers in France is, we think, a magistrate competent to take in France, and authenticate by his official act the declaration of the grantor of a deed, that he has executed the same freely as his act and deed, and that such acknowledgment so authenticated is sufficient to warrant the register of deeds in this commonwealth to record it." See, also, Palmer v. Stevens, 11 Cush. 152; Learned v. Riley, 14 Allen, 113. In the latter case it was held that a justice of the peace might take an acknowledgment out of his county.

¹ Middlebury College v. Cheney, 1 Vt. 336, 350.

whether their office was known as principal or inferior notary, or consul-general or vice-consul.¹

§ 471. **Acknowledgment before an officer de facto.**—An acknowledgment taken before an officer *de facto* is valid and cannot be attacked. Thus, where an acknowledgment was taken before a magistrate whose commission had expired before the acknowledgment was made, it was held that it was sufficient. “Though at the expiration of his commission, an officer may be disqualified from acting officially, yet it may not be so plain and obvious as to deprive him of an apparent right to exercise the office. Others are not required to ascertain at their peril, whether he is legally qualified, before yielding to his authority, or calling upon him to perform official acts, proper and necessary to be done. They are not obliged to demand or test his authority, or to ascertain the date or duration of his commission; nor is there a necessity upon him, ordinarily, to proclaim or exhibit the tenure or character of his official authority. . . . His office and authority may be valid as to others, though invalid as to himself. These doctrines are held to be founded in public policy and convenience, and necessary to the maintenance of the supremacy and execution of the laws, and for the protection and security of individual rights. Hence, the law favors the official acts of those in reputed authority, and the rights of those claiming title or interest through these

¹ *Mott v. Smith*, 16 Cal. 533. But see *McMinn v. O'Connor*, 27 Cal. 238; *Ingoldsby v. Juan*, 12 Cal. 564; *Hopkins v. Delaney*, 8 Cal. 85; *Muller v. Boggs*, 25 Cal. 175; *Lord v. Sherman*, 2 Cal. 498; *Emmal v. Webb*, 36 Cal. 197; *Kimball v. Semple*, 25 Cal. 440; *Colton v. Seavey*, 22 Cal. 496. And for the construction of other special statutes as to the power of certain officers to take acknowledgments, see *Shanks v. Lancaster*, 5 Gratt. 110; 50 Am. Dec. 108; *James v. Fisk*, 9 Smedes & M. 144; 47 Am. Dec. 111. Under a statute of Texas providing that “the acknowledgment or proof of an instrument in writing for record may be made without this State, but within the United States, before either (1) a clerk of a court of record having a seal; (2) a commissioner of deeds duly appointed under the laws of this State; (3) a notary public,” it was held that a judge of a court of record without the State was not authorized to take an acknowledgment: *Talbert v. Dull*, 70 Tex. 675.

proceedings.”¹ The rule is that when a person assumes to act in an official position, and he has a color of title to the office he claims to hold, his acts, when they are questioned

¹ *Brown v. Lunt*, 37 Me. 423, 431, 433. The court entered into an extensive discussion concerning the acts of officers *de facto*, and after stating that the officer was not one *de jure*, said: “‘An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law’ (*Parker v. Kett*, 1 Raym. Ld. 658; *The King v. The Corporation of Bedford Level*, 6 East, 368); or one who actually performs the duties of an office with apparent right, and under claim and color of an appointment or election. He is not an officer *de jure*, because not in all respects qualified and authorized to exercise the office; nor an usurper who presumes to act officially, without any just pretense or color of right. A mere claim to be a public officer, and exercising the office, will not constitute one an officer *de facto*; there must be, at least, a fair color of right; or an acquiescence by the public in his official acts so long that he may be presumed to act as an officer by right of appointment or election: *The King v. Lisle*, 2 Strange, 1090; *Wilcox v. Smith*, 5 Wend. 231; 21 Am. Dec. 213; *Plymouth v. Painter*, 17 Conn. 588; 44 Am. Dec. 574; *Baird v. The Bank of Washington*, 11 Serg. & R., 411. The distinction between officers *de facto*, acting *colore officii*, and officers *de jure*, has been recognized in England from an early period, and seems to have been applied to officers of every grade, from the king to the lowest incumbent of office. In statute of Edw. IV., ch. 1, Henry IV., V., and VI. were styled ‘late kings of England successively in *dede* and *not of right*.’ And in charters granted by King Edw. IV. he describes the line of Lancaster as *nuper de facto, et non de jure, reges Angliæ*. Henry VI. was regarded as king *de facto*, although he had been declared an usurper by act of Parliament; and treasons against him were punishable as capital offenses, during the reign of his successor: 1 Blackst. Com. 204, 371; 1 Hale P. C. 60, 61; Foster, 397, 398. The same distinction has been made in the courts of England, in respect to the office of an abbot (*L’Abbe De Fontein’s Year Book*, 9 Henry VI., 33); of a bishop and of a steward of a manor (*Harris v. Jays*, Cro. Eliz. 699; *Parker v. Kett*, 1 Raym. Ld. 660); of a mayor (*Knight v. The Corporation of Wells*, Lutw. 580; *The King v. Lisle*, 2 Strange, 1090); of a deputy collector of customs (*Leach v. Howell*, Cro. Eliz. 533); of a registrar of a corporation (*The King v. The Corporation of Bedford Level*, 6 East, 368); and of a justice of the peace who had not taken the oath of office before assuming its duties (*Proprietors of Pier v. Haunam*, 3 Barn. & Adol. 266), and his acts were held valid, although he had not complied with the requirements of the statute (Geo. II., ch. 20) in taking the oath of qualification, on the ground that the interest of the public at large required that the acts done should be sustained; Abbott, C. J., remarking that many persons acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts properly corporate and official, done by such persons are void, yet acts

in a proceeding to which he is not a party, are effectual. He may be liable to punishment for his assumption of official power, yet third persons cannot be affected by his

done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known. The same distinction is equally well known in this country, and has been applied in numerous cases, and to a great variety of offices, where persons have claimed to act *colore officii*, though not qualified according to the requirements of law, and where their acts as officers *de facto* have been upheld. It is familiar doctrine in the courts of our own State, and is sustained by the cases following: Fowler v. Bebee, 9 Mass. 231; 6 Am. Dec. 62; Nason v. Dillingham, 15 Mass. 170; Bucknam v. Ruggles, 15 Mass. 180; 8 Am. Dec. 98; Commonwealth v. Kirby, 2 Cush. 577; Plymouth v. Painter, 17 Conn. 585; 44 Am. Dec. 574, where it was held that a grand juror, though legally disqualified by a refusal to take the requisite oath, might be regarded as an officer *de facto*: Smith v. State, 19 Conn. 493; The People v. Collins, 7 Johns. 549; McInstry v. Tanner, 9 Johns. 135; Trustees of Vermont Society v. Hills, 6 Cow. 23; 16 Am. Dec. 429; Wilcox v. Smith, 5 Wend. 231; 21 Am. Dec. 213; The People v. Bartlett et al., 6 Wend. 422, in which case it was held that the trustees of a village holding over beyond the term for which they were elected by their own neglect, were liable to be ousted on *quo warranto*; but that they were officers *de facto*; that their acts for certain purposes were valid, and that their title to the office could not be inquired into collaterally: The People v. White, 24 Wend. 527; The People v. Covert, 1 Hill, 674; The People v. Stevens, 5 Hill, 610, 630, 631; The People v. Hopson, 1 Denio, 574; Greenleaf v. Low, 4 Denio, 168; McGregor v. Balch, 14 Vt. 428; 39 Am. Dec. 231; Moore v. Graves, 3 N. H. 408; Tucker v. Aiken, 7 N. H. 113, where the rule was held to be applicable to town officers: Cocks v. Halsey, 16 Peters, 81; Allen v. McKeen, 1 Sum. 312. . . . In this case, as it appears by the report, the magistrate whose official character and authority is in question, had been an acting justice of the peace, 'constantly and frequently,' for forty years successively under commission, and qualified as we must understand; and was well known as such officer to the parties to the deed, and consequently, from the nature of his official acts and duties, was well known to the public. He was not an intruder, and did not usurp the office; but was in by appointment, and acting with color of title, though holding over the time, limited by his commission, and without legal authority. He had been admitted to the legal possession and enjoyment of the office by taking the requisite oath of qualification, as seems to be conceded: 1 Strange, 538; Rex v. Ellis, 9 East, 252, n. The acts in question were within the jurisdiction of a justice of the peace, and among the ordinary duties of such officers. It does not appear that his official character had ever been questioned. And while it must be admitted that there may be cases in which it might be difficult to determine whether a person exercised a particular office by color of right, or as a mere usurper, yet this in our opinion is not one of that character. Here the evidence justifies and requires the

want of power when there exists a color of title to the office. A duly appointed, commissioned, and qualified justice of the peace for a certain county had acted in that capacity for a number of years, but subsequently, during the term for which he had been appointed, removed to another State. He, however, had an office and continued in business in the county for which he was originally appointed, and continued to act as a justice of the peace for that county, and as one of such acts took an acknowledgment of a deed. It was held that he was an officer *de facto*, and that as to third persons having an interest in his acts, they were valid and could not in a collateral action be inquired into.¹

conclusion that the magistrate appeared to have had a right and colorable title to the office which he assumed to exercise when he took the acknowledgment, and made upon the deed the certificate in question. He being in reputed authority as a magistrate of long standing, third persons requiring his official services were not bound to ascertain whether or not he had a commission in force; nor are they chargeable with notice of the date or termination of his commission. It is not reasonable to suppose that he would put the parties or the public on the inquiry into his official authority, so long as he was exercising the office, 'believing that he was a justice of the peace,' as he testified. The case shows that neither the magistrate, nor the parties to the deed, nor the public, by fair presumption, knew or supposed that his commission had expired. He had been duly accredited by the government, and was assuming to act in his official capacity, as of right, and with at least a colorable right; and the public and third persons might well regard him as continuing in authority, until it became apparent that his official character was lost or changed. He must be regarded, therefore, as a justice of the peace *de facto* when he took and certified the acknowledgment of the deed to Mrs. Lunt." That an acknowledgment before a *de facto* officer is valid, see further, *Hamlin v. Kasafer*, 15 Or. 456; 3 Am. St. Rep. 176; *Bullene v. Garrison*, 1 Wash. 587; *Woodruff v. McHarry*, 56 Ill. 218; *Hamilton v. Pitcher*, 53 Mo. 334; *Macey v. Stark*, 116 Mo. 481; *Prescott v. Hayes*, 42 N. H. 56; *Wilson v. Kimmel*, 109 Mo. 260; *People v. Collins*, 7 Johns. 549; *State v. Douglass*, 50 Mo. 593; *State v. Dierberger*, 90 Mo. 369.

¹ *Prescott v. Hayes*, 42 N. H. 56. Sargent, J., said: "Such an officer may act under those who have a legal right to appoint, but by an irregular or informal appointment; or he may have a regular and sufficient appointment, but may not have been duly qualified to perform his duties under it; or he may have removed, as in this case, and became, perhaps, disqualified to act, if his authority was being inquired into by the State, who gave him his commission, in a proceeding directly against him; yet so long as he has not been removed, nor his authority revoked, and when

§ 471 a. Certificate authenticating acknowledgment taken out of State.—If the acknowledgment is taken out of the State and the statute requires that it should be accompanied by a certificate that the signature is genuine, and the person acting is what he describes himself to be, the omission of such certificate is fatal, and the record of the deed will not have the effect of imparting notice.¹ In Nebraska such a certificate is required where the officer has no seal, and its absence renders the certificate of acknowledgment a nullity. Mr. Chief Justice Maxwell of that State observes: "The legislature has declared the manner in which a deed, executed and acknowledged in another State, before an officer having no seal, shall be authenticated. This is a matter over which the courts

he is doing business in the county, and acting as magistrate, claiming authority under his commission, which is still in life, this must be construed to give him some color of title; and when such an officer acts under color of title, his acts, when not expressly declared void by statute, though the performance of them may be punishable by a penalty, are in all cases, when coming in question incidentally, and as to third persons, held to be valid: *Jones v. Gibson*, 1 N. H. 266; *Johnston v. Wilson*, 2 N. H. 205; 9 Am. Dec. 50; *Londonderry v. Chester*, 2 N. H. 268; 9 Am. Dec. 61; *Moore v. Graves*, 3 N. H. 408; *Morse v. Calley*, 5 N. H. 222; *Horne v. Whittier*, 6 N. H. 93; *Tucker v. Aiken*, 7 N. H. 113; *State v. Wilson*, 7 N. H. 545; *Cavis v. Robertson*, 9 N. H. 528; *Merrill v. Palmer*, 13 N. H. 184; *Portsmouth's Petition*, 19 N. H. 115; *Bean v. Thompson*, 19 N. H. 290; 49 Am. Dec. 154; *Baker v. Shepard*, 24 N. H. 212; *Fowler v. Bebee*, 9 Mass. 231; 6 Am. Dec. 62; *Commonwealth v. Fowler*, 10 Mass. 290; *Nason v. Dillingham*, 15 Mass. 170; *Bucknam v. Ruggles*, 15 Mass. 180; 8 Am. Dec. 98; *Doty v. Gorham*, 5 Pick. 487; 16 Am. Dec. 417; *Potter v. Luther*, 3 Johns. 481; *People v. Collins*, 7 Johns. 549; *McInstry v. Tanner*, 9 Johns. 135; *Reed v. Gillett*, 12 Johns. 296; *Wilcox v. Smith*, 5 Wend. 231; 21 Am. Dec. 213; *Doe v. Brown*, 5 Barn. & Ald. 243; *Leonard v. Scadding*, Ad. & E., N. S., 706." So where a deputy may act, an acknowledgment before a deputy *de facto* is valid: *Thompson v. Johnson*, 84 Tex. 548.

¹ *Flechsner v. Sumpter*, 12 Or. 161; *Musgrove v. Bosner*, 5 Or. 313; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436; *Connell v. Gallagher*, 36 Neb. 749; *Irwin v. Welch*, 10 Neb. 479; *O'Brien v. Gaslin*, 20 Neb. 347; *Jones v. Berkshire*, 15 Iowa, 248; 83 Am. Dec. 412; *Fisher v. Vaughn*, 75 Wis. 609; *Dyson v. Simmons*, 48 Md. 207; *Morton v. Smith*, 2 Dill. 316; *Dohm v. Haskin*, 88 Mich. 144; *Final v. Backus*, 18 Mich. 218; *Steeple v. Downing*, 60 Ind. 478; *Grand Tower etc. Co. v. Gill*, 111 Ill. 541; *Lyon v. Kain*, 36 Ill. 362; *Shephard v. Carriel*, 19 Ill. 319; *Quimby v. Boyd*, 8 Col. 194.

seem to have but little discretion. If the provision is too stringent the remedy lies with the legislature; but to entitle a deed to be received in evidence it must be certified in the mode provided in the statute."¹ But such a certificate may be secured subsequently.² And, in some instances, a deed, though not entitled to record, but which in fact has been recorded, may operate as actual notice, while it cannot impart constructive notice.³ Where the statute requires it, the clerk must certify that the court was one of record, and must certify positively that the signature is genuine. Thus a statute provided that to authorize the record of a deed it must be attested when executed out of the State, among other officers, "by a judge of a court of record in the State where executed, with a certificate of the clerk under the seal of such court of the genuineness of such signature." A certificate by the clerk, under such a statute, that a person named "is a duly commiss^{er}ed and qualified judge of the county court for said co^{un}ty, authorized to administer oaths and take acknowledg^{ments} v^{er} oaths; that I am acquainted with the handwriting of ^{the} said judge and believe his signature to the foregoing to be genuine," it is held, is totally insufficient.⁴ But where an acknowledgment was made before an officer who had authority to take it and, as a matter of fact, was in due form, a certificate by the clerk of the superior court of the county in which the

¹ O'Brien v. Gaslin, 20 Neb. 347, 354. See, also, Heelan v. Hoagland, 10 Neb. 511.

² Reasoner v. Edmundson, 5 Ind. 393.

³ Musgrove v. Bosper, 5 Or. 313.

⁴ McKenzie v. Jackson, 82 Ga. 80. The court said that the fact that the court was one of record might perhaps have been proven at the trial, but that the certificate of the clerk to the genuineness of the signature was fatally defective. "The clerk, under our law," said the court, "must certify positively that the signature is genuine. Nor is it an unreasonable requirement. If a judge of a court of record attests a paper, signing his name thereto, the clerk of that court ought to be able to certify positively as to the genuineness of his signature. He knows the judge, has seen him write, and can see him sign his name if necessary, and therefore can certify positively as to the genuineness of his signature."

land is situated, that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," was considered to be sufficient, although it did not follow the words of the statute that it was in "due form."¹

§ 471 b. *Same subject, continued.*—Where the judge is his own clerk he may certify to his attestation of a deed under the seal of the court.² Where the statute requires the officer to certify that he "is acquainted with the handwriting of such person, and that he verily believes the signature subscribed to the certificate of acknowledgment to be genuine," a recital in the certificate authenticating the acknowledgment, "that the signature attached to the annexed instrument is genuine" is sufficient.³ The certificate of authentication must be issued by an officer who has authority to issue it, else it will be of no avail.⁴ The certificate must show that the officer was such at the time the acknowledgment is taken.⁵ Judicial notice may be taken of the fact that certain courts in other States are courts of record.⁶ In a case in Michigan it appeared that the only description of official character of the person acknowledging a deed in New York consisted of the letters "J. P." appended to his name. A certificate in the form prescribed by statute as to the execution of deeds in other States, however, was attached, and it also contained an attestation of the official character of the officer taking the acknowledgment as a justice of the peace. It was held to be sufficient.⁷ If the certificate fails to state that the acknowledgment was according to the laws

¹ *Deans v. Pate*, 114 N. C. 194.

² *Moore v. Hill*, 59 Ga. 760.

³ *Wells v. Atkinson*, 24 Minn. 161.

⁴ *Lartor v. Bolinger*, 59 Tex. 411; *Doe v. Smith*, 3 McLean (U. S.), 362.

⁵ *Phillips v. People*, 11 Ill. App. 340; *Hilgendorf v. Ostrom*, 46 Ill. App. 465.

⁶ *Munroe v. Eastman*, 31 Mich. 283; *Shotwell v. Harrison*, 22 Mich. 410; *Morse v. Hewett*, 28 Mich. 481. See, also, *People v. Marion*, 29 Mich. 31.

⁷ *Final v. Backus*, 18 Mich. 218.

of the State where it was made, it is defective.¹ Evident clerical errors, it is held, may be disregarded.² But, as in the case of other acknowledgments, a deed is valid between the parties, no matter how defective the acknowledgment may be, or even in the absence of any acknowledgment at all; so in the case of a failure to attach a certificate of authentication or of fatal defects in it, the validity of the deed as between the parties is not affected. The deed, when signed, executed, and delivered, is valid as a conveyance, and the want of a certificate of authentication, or defects in it, can only render the deed incompetent for registration and consequently for imparting notice.³

§ 472. **Temporary appointment.**—An acknowledgment before a person who describes himself in his certificate as a clerk *pro tempore* of a court is sufficient, if the person taking the acknowledgment is clerk *de facto*. The temporary character of his appointment does not affect the question.⁴ In a case in Missouri, a deed offered in evidence was objected to, because the notary who took the acknowledgment, though acting as such, had not been duly commissioned. The lower court gave this declaration of law: "The court declares the law to be, that the conveyance from Samuel D. Pitcher and wife, being acknowledged before a *de facto* officer, was good and sufficient, although there may have been a defect in his commission." The supreme court said that in this, "the court was clearly right. Whether the notary was commissioned or not, could not be inquired into, in a collateral proceeding. His official acts as a

¹ *Morton v. Smith*, 2 Dill (U. S.), 316. For other cases in which such certificates have been passed upon, see *Booth v. Cook*, 20 Ill. 130; *Harding v. Curtis*, 45 Ill. 262; *Marston v. Brashaw*, 18 Mich. 81; 100 Am. Dec. 152; *Texas Land Co. v. Williams*, 51 Tex. 51; *Crispen v. Hannavan*, 50 Mo. 415; *Elwood v. Flannigan*, 104 U. S. 562; *Criswell v. Altemus*, 7 Watts (Pa.), 565; *Creigh v. Beelin*, 1 Watts & S. (Pa.) 83.

² *Quimby v. Boyd*, 8 Col. 94.

³ *Connell v. Gallagher*, 36 Neb. 749; *Gillespie v. Johnston*, Wright (Ohio), 231. See, also, *Galpin v. Abbott*, 6 Mich. 17.

⁴ *Woodruff v. McHarv*, 56 Ill. 218.

notary were good, notwithstanding he might have usurped the office."¹ And where commissioners were empowered to convey public land of a State, it was held that after their authority had been revoked, they might acknowledge a deed executed by them.² Nor is the acknowledgment impaired by the fact that it was made by a commissioner appointed by the governor, and his term of office had expired at the time the acknowledgment was taken.³ A person, however, who has formerly filled the office of a justice of peace in a county, but has ceased to fill that office in the county, though filling that office in another county, does not possess authority to sign his name to a blank or defective certificate of acknowledgment, so as to cause the certificate to operate by relation as of the day inserted in it as its date.⁴

§ 473. Acknowledgment before deputy.—It is a general rule that when an officer having power to take an acknowledgment is authorized to appoint a deputy, the deputy also has power to take and certify an acknowledgment.⁵ This question has been quite fully discussed in California. In one case an acknowledgment was taken before a deputy recorder, and certified in the name and as the act of his principal. The recorder was authorized by

¹ *Hamilton v. Pitcher*, 53 Mo. 334, 335.

² *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73.

³ *Thorn v. Frazer*, 60 Tex. 259.

⁴ *Carlisle v. Carlisle*, 78 Ala. 542.

⁵ *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Muller v. Boggs*, 25 Cal. 175, 186; *Babbitt v. Johnson*, 15 Kan. 252; *Beaumont v. Yeatman*, 8 Humph. 542; *Kemp v. Porter*, 7 Ala. 138; *Hope v. Sawyer*, 14 Ill. 254; *Moore v. Furrow*, 3 Marsh. A. K. 41; *Gibbons v. Gentry*, 20 Mo. 468; *Rose v. Newmann*, 26 Tex. 131; 80 Am. Dec. 646; *Cook v. Knott*, 28 Tex. 85; *Abrams v. Ervin*, 9 Iowa, 87; *Gordon v. Leech*, 81 Ky. 229; *Drye v. Cook*, 14 Bush, 459; *Lynch v. Livingston*, 8 Barb. 463; *West v. Schneider*, 64 Tex. 327; *Marx v. Hanthorn*, 30 Fed. Rep. 579; *Piper v. Chippewa Iron Co.*, 51 Minn. 495. See, as to an acknowledgment before a deputy *de facto*, *Thompson v. Johnson*, 84 Tex. 548. In support of an acknowledgment in another State before a deputy clerk of a court, signing himself as such, and affixing the seal of office, it will be presumed that the clerk had authority to appoint a deputy: *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106.

law to appoint a deputy, but nothing was said about the latter's duties, except in a section which provided that "in case of a vacancy in the office of recorder, or his absence or inability to perform the duties of his office, the deputy shall perform the duties of recorder during the continuance of such vacancy, absence, or inability." It was claimed that the deputy had no power other than that conferred by this section, and that a vacancy in the office, or the absence or inability of the recorder, was a condition precedent to the exercise of any power on the part of the deputy. But the court said: "We do not so read the statute. In our judgment the legislature do not intend to define what shall be the duties of the deputy, except in the contingencies named in the ninth section, leaving the measure of his power under other circumstances to the common law. The ninth section should be read as an enlargement of his powers, and not as a restriction upon them. To guard against the inconvenience which might result to the public in case of a vacancy in the office of recorder, or his absence or inability, was the design of the ninth section, and to that end it makes the deputy, in the contingencies named, recorder *de facto*. Under the construction contended for, the recorder would be unable to avail himself of the services of a deputy, except as provided in the ninth section, which might not unfrequently result in great detriment to the interests of the public, from mere inability on his part to perform the amount of labor necessitated by the business of the office. If a vacancy in the office, or the absence or inability of the recorder, are conditions precedent to the exercise of power by the deputy, such conditions would have to be recited in every official act of the deputy in order to impart to it any validity. In the absence of language to that effect, so clear and explicit as not to admit of doubt, we cannot intend that the legislature designed consequences so unusual and absurd. The power to appoint a deputy is expressly conferred upon the recorder, and the duties of the deputy not being prescribed, as we hold,

except in the contingencies named in the ninth section, it follows that his official power is to be ascertained by a resort to the common law. At common law, there can be no question but that the deputy, where the power to appoint one exists, has full power to do any and all acts which his principal may perform by virtue of his office.”¹ In Iowa, on the ground that a clerk is a ministerial officer, it is held that an acknowledgment may be taken by his deputy. “Where the duties of a public officer are of a ministerial character, they may be discharged by deputy. Duties of a judicial character cannot be so discharged. The clerk is a ministerial officer. When the law gives him power to appoint a deputy, such deputy, when created, may do any act that the principal might do. He cannot have less power than his principal. He has the right to subscribe the name of his principal; and the act of the deputy, in the name of the principal, within the scope of his authority, is the act of his principal.”² Where a

¹ *Muller v. Boggs*, 25 Cal. 175, 185. See, also, *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Emmal v. Webb*, 36 Cal. 203.

² *Abrams v. Ervin*, 9 Iowa, 87, 90, per Stockton, J. In Texas, in the case of *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172, a *dictum* is found that a deputy has no power to take an acknowledgment. But this is corrected in the later cases of *Rose v. Newmann*, 26 Tex. 131, 80 Am. Dec. 646, and *Cook v. Knott*, 28 Tex. 85, in the latter of which it is said: “The appellant’s counsel states that it was contended below that the deed was not duly registered, from the fact that it had been authenticated for record, and recorded by the deputy clerk of the county court. In the case of *Miller v. Thatcher*, 9 Tex. 482; 60 Am. Dec. 172, this language is used: ‘The deed does not appear to have been authenticated by any person known to the law, authorized to make such authentication. It was made by the deputy clerk of the probate court.’ Nothing in that cause demanded the decision of the question as stated in the opinion. In the case of *Rose v. Newmann*, at Austin, 1862, 26 Tex. 131, 80 Am. Dec. 646, the contrary doctrine has been announced, and it was, that the deputy clerk of the county court did have all the power and authority of the clerk himself to take proof of the execution of instruments, authenticate and record them. We find the following in the opinion delivered in the case of *Rose v. Newmann*: ‘The business of a deputy is to perform the duties of his principal; taking proof of instruments for record in his county being one of the duties of the clerk of the county court, his deputy had authority to perform it.’ In this opinion we fully concur.” See *McRaven v. McGuire*, 9 Smedes & M. (17 Miss.) 34, where this same

probate judge is compelled by law to act as his own clerk, but is authorized by an entry of record, to appoint a separate clerk, who shall be paid by the judge, and shall hold his office at the latter's pleasure, and who is required to give bonds to discharge the duties of his office, and is empowered to discharge all the duties of clerk, and perform all acts in vacation which the judge may be authorized to perform in vacation, the clerk is an officer of the court and has authority to take acknowledgments.¹

§ 474. Deputy taking acknowledgment in his own name.—Some contrariety of opinion exists as to the proper manner in which the deputy should certify the acknowledgment. In Kentucky, the proper practice is to have the certificate in the usual form, reading precisely as if the clerk in proper person had taken and certified the acknowledgment.² On the other hand, it is stated that the certificate should be made by the deputy in his own name, without naming the principal.³ A certificate

view is held, but where Chief Justice Sharkey files a dissenting opinion. See, also, *Abrams v. Ervin*, 9 Iowa, 87; *Lynch v. Livingston*, 6 N. Y. 422; *Hope v. Sawyer*, 14 Ill. 254; *Gibbons v. Gentry*, 20 Mo. 468; *McCraven v. Doe*, 23 Miss. 100.

¹ *Young v. Boardman*, 97 Mo. 181.

² *Talbot's Devises v. Hooser*, 12 Bush, 408. Judge Coffey, delivering the opinion of the court, said: "Whatever official act is done by a deputy should be done in the name of the principal, and not in the name of the deputy. The authority given by law to a ministerial officer is given to the incumbent of the office. Authority is not given to the deputy, but to the principal, and is exercised by the principal, either by himself or his deputy, so that whether the deed was acknowledged before B. M. Harrison in proper person, or before R. E. Harrison, it was, in contemplation of law, acknowledged before the former in his official capacity; and it was not only lawful, but entirely proper that the body of the certificate should read precisely as if the clerk in proper person had taken and certified the acknowledgment, the only irregularity being that the deputy omitted, after signing his principal's name, to add 'by R. E. Harrison, D. C.' " Section 474, as above, is cited as authority in *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106.

³ *Beaumont v. Yeatman*, 8 Humph. 542. Turley, J., delivering the opinion of the court, said: "Now, how this acknowledgment of the execution of the mortgage, made before the deputy clerk, could have been taken in the name of the principal clerk, it seems very difficult to con-

which stated that "before me, the undersigned, county clerk of Sonoma county, personally appeared," etc., and was signed "John A. Brewster, Deputy County Clerk of Sonoma county," the principal's name not appearing, was held valid.¹ While the signature by the deputy alone does not affect or invalidate the acknowledgment, yet as was said in a case where a deputy was held authorized to take the acknowledgment in his own name, "it is certainly more regular in point of form, that the deputy should perform all official acts in the name of his principal."² The better practice, undoubtedly, in our opinion, is for the deputy to sign the name of the principal, by himself as deputy.

ceive. How would the entry of the acknowledgment be indorsed? 'This day personally appeared before A B, the principal clerk of the County Court of Montgomery, by his deputy, C. D.' This is not so, for an appearance before the deputy is not an appearance before the principal, and cannot possibly be. Well, let us see again. 'This day personally appeared before A B, the deputy, and acknowledged to C D, the principal.' This will not do, for an acknowledgment to A B is not, and cannot be, an acknowledgment to C D; it not being a case where the acknowledgment inures upon the relation of principal and agent, there being nothing acknowledged for the benefit of the principal. Well, again: 'This day personally appeared before A B, the principal clerk, C D, and acknowledged. Test, E F, deputy.' This is not true; the appearance was not for A B, the principal, but E F, deputy; and if it had been before the principal, the principal must have certified. Then it seems to us that an acknowledgment of a deed can only be taken in the name of the person before whom the acknowledgment is made, and that there is no sense in talking about taking it in the name of a person before whom it is not made. It is true the signature to the certificate might be A B, principal clerk, by his deputy C D; but *cui bono*? The signature by the principal binds the principal to nothing; it is not like a contract where the agent must bind the principal by his signature, or there is no obligation on his part; the act is merely ministerial on the part of the deputy, and is good by law, independent of the statute, which makes no new rule except it be (as is contended) by implication." And see *McKenzie v. Jackson*, 82 Ga. 80; *Cook v. Knott*, 28 Tex. 85; *Woods v. James*, 87 Ky. 511; *Gordon v. Leech*, 81 Ky. 229.

¹ *Touchard v. Crow*, 20 Cal. 150; 81 Am. Dec. 108. See *Herndon v. Reed*, 82 Tex. 647; *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106.

² *McCraven v. McGuire*, 23 Miss. 100. See, also, *Cook v. Knott*, 28 Tex. 85. If a statute validates probates of deeds and privy examinations taken before a deputy clerk prior to a certain time, the question is immaterial whether the deputy clerk in making the probate signed as deputy clerk,

§ 475. Presumption as to appointment of deputy. In Illinois, an acknowledgment made out of the State which was signed "Archibald Gamble, Clerk, by E. Baker, Deputy Clerk," and authenticated by the seal of a court of record, was held to be *prima facie* sufficient.¹ The presumption in such a case is that by the laws of the State in which the acknowledgment is taken, the appointment of a deputy clerk is permitted, and that the seal was affixed by the proper officer. And it would be further presumed that the person who signed the certificate in the relation of a deputy was regularly appointed as such.²

§ 476. Officer cannot take acknowledgment of deed in which he is interested.—Aside from the question as to whether an officer in taking an acknowledgment acts in a judicial or in a ministerial capacity, it is settled that he cannot take the acknowledgment of a deed to which he is a party or in which he is directly interested.³ "We

or merely signed the name of the clerk thereto: *Gordon v. Collett*, 107 N. C. 362.

¹ *Hope v. Sawyer*, 14 Ill. 254.

² *Hope v. Sawyer*, 14 Ill. 254. Says Treat, C. J.: "The acknowledgment purports to have been taken by the clerk; and it is certified in his name, and under the seal of the court. *Prima facie*, this is sufficient. The seal of the court proves itself, and we must presume that it was affixed by the proper officer. The presumption is that the clerk was authorized by the laws of Missouri to act through a deputy, and that Baker was regularly appointed as such. The deputy had the power to use the name of the clerk, and attach the seal of the court. The act of an agent within the scope of his authority, and in the name of his principal, is as binding on the principal and third persons, as if performed by the principal personally. It is the act of the principal, and not of the agent. The certificate in question was none the less the act of the clerk, because made by his authorized deputy." This section was cited as authority in *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, where the authorities are collected.

³ *Hogans v. Carruth*, 18 Fla. 587; *Wilson v. Traer*, 20 Iowa, 231; *Beaman v. Whitney*, 20 Me. 420; *Groesbeck v. Seeley*, 13 Mich. 329; *Tavener v. Barrett*, 21 W. Va. 656; *Brown v. Moore*, 38 Tex. 645; *Wasson v. Conner*, 54 Miss. 352; *Withers v. Baird*, 7 Watts, 227; 32 Am. Dec. 754; *Stevens v. Hampton*, 46 Mo. 404; *Green v. Abraham*, 43 Ark. 420; *West v. Krebaum*, 88 Ill. 263; *Hammer v. Dole*, 61 Ill. 307; *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Davis v. Beazley*, 75 Va. 491; *Corey v. Moore*, 86 Va. 721; *Brereton v. Bennett*, 15 Col. 254; *Sample v. Irwin*,

should have no hesitation in holding that a person could not take the acknowledgment of a deed made to himself. Such a point is too plain for doubt."¹ A person is not, because he owns an interest in a parcel of land, so far interested in the whole tract as to preclude him from taking, in his official character, the acknowledgment of a deed, by which another and distinct interest in the same land is conveyed to a third party. Nor would the fact that there was an agreement or understanding between the grantee in the deed and the person who took the acknowledgment be of itself sufficient to invalidate the deed. It might possibly be a circumstance tending to show fraud or a predetermined combination to impose upon the grantors.² It is no objection to a sheriff's deed that it was acknowledged in a court over which one of the grantees presided as judge.³ But a clerk of a court cannot take his own acknowledgment of a deed executed by him so as to make it operative as a deed admitted to record, against a subsequent purchaser for value from him.⁴

45 Tex. 567; *Rothschild v. Daugher*, 85 Tex. 332; 34 Am. St. Rep. 811; *Darst v. Gale*, 83 Ill. 136; *Jones v. Porter*, 59 Miss. 628; *Black v. Gregg*, 58 Mo. 565; *Bennett v. Shipley*, 82 Mo. 488; *Hainey v. Alberry*, 73 Mo. 427; *Dail v. Moore*, 51 Mo. 589; *Freeman v. Person*, 106 N. C. 251.

¹ Campbell, J., in delivering the opinion of the court, in *Groesbeck v. Seeley*, 13 Mich. 329, 345. The learned editor of the *American Decisions* says, in a note to *Withers v. Baird*, 32 Am. Dec. 757: "An acknowledgment is an authentication of an instrument that enables it to be used for purposes of evidence in a manner different from what it could have been previously. The duties of an officer taking an acknowledgment seem to be at the same time judicial and ministerial. Judicial in that the officer has to determine upon the identity of parties, etc., and ministerial in that he has to give a certificate of the facts found. Regarding his duties as judicial, no officer may take an acknowledgment of a deed in which he is interested, for no one may be a judge in his own case; besides, it would be an attempt to create evidence in one's own favor; an attempt, too, which must, in the majority of cases, be altogether irresponsible."

² *Dussaume v. Burnett*, 5 Iowa, 95.

³ *Lewis v. Curry*, 74 Mo. 49.

⁴ *Davis v. Beazley*, 75 Va. 491. But in Kentucky, where only the county clerk and his deputies are authorized to take acknowledgments of deeds, it is held that the clerk may take the acknowledgment of a deed in which he is the grantee: *Stevenson v. Brasher*, 90 Ky. 23; 13

§ 477. **Where the officer taking the acknowledgment is a trustee.**—It is held that the interest a trustee has in the commission for his services is sufficient to disqualify him from taking the acknowledgment of a deed of trust.¹ In a case in Missouri, Judge Bliss refers to the authorities in which acknowledgments have been held invalid because taken by parties in interest, and says: "I have found no case where it was taken by a trustee; and perhaps there might be ground for holding that where the grantee was a mere naked trustee, the title, by the statute of uses, vesting at once in the beneficiary, the acknowledgment should be held to be valid. But trustees to hold in pledge, with power of sale, stand in a very different relation. The objection to the party in interest is analogous to the one forbidding a judge to pass upon his own case. Though the act may not be strictly judicial, it is of a judicial nature, and requires disinterested fidelity. We know that in practice this kind of trustee is always selected by the beneficiary; he is controlled by the beneficiary in fixing the time of the sale, and its proceeds come into his hands. There is such an interest that, as to the requisites of the deed itself, he should be placed upon a level with the other parties, and be incapacitated from holding any official relation to its execution."² The acknowledgment of

S. W. Rep. 242. A statute providing that in cases where the judge or clerk of the superior court, mistaking their power, have probated deeds and have ordered them registered, such probates shall be as valid as if taken before a proper officer having jurisdiction, does not cure the probate of a deed taken before a clerk, the grantee, who had jurisdiction of the subject matter, in violation of a statute declaring that no clerk can act as such in reference to any estate or proceeding, if he or his wife is a party to any deed: *Freeman v. Person*, 106 N. C. 251. It has been held that a clerk who is a subscribing witness to a deed is qualified to take the acknowledgment of the grantor: *Trenwith v. Smallwood*, 111 N. C. 132. It has also been held that a notary who acts as the agent for both parties may attest the deed: *Wardlaw v. Mayer*, 77 Ga. 620.

¹ *Brown v. Moore*, 38 Tex. 645; *Dail v. Moore*, 51 Mo. 589; *Black v. Gregg*, 58 Mo. 565; *Rothschild v. Daugher*, 85 Tex. 332; 34 Am. St. Rep. 811; *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Withers v. Baird*, 7 Watts, 227; 32 Am. Dec. 754. An agent of the beneficiaries is likewise disqualified: *Sample v. Irwin*, 45 Tex. 467.

² See *Stevens v. Hampton*, 46 Mo. 404, 407.

a deed by one of a number of trustees empowered to act separately and in the alternative—that is, if one was unable to act, another might act in his place—is void as to the trustee taking the acknowledgment. But the execution of the deed may be proven *aliunde*.¹ And if a married woman acknowledges before a person who holds a deed of trust from her a deed to his wife in satisfaction of the trust deed, it is void.² If the execution of a trust deed is otherwise duly proved, it is good between the parties and those claiming under them, notwithstanding that it was acknowledged before the trustee.³

§ 477 a. Degree of interest.—While the rule is clear that a person who is directly interested in a deed can-

¹ *Darst v. Gale*, 83 Ill. 136. In *Gibson v. Norway Savings Bank*, 69 Me. 579, the question was raised that the treasurer of a savings bank could not take the acknowledgment of a grantor's deed to the bank. But the court did not decide the question, holding that there was no evidence that the officer was treasurer at the time the acknowledgment was taken. Says Virgin, J: "It is urged that the plaintiff is not chargeable with the constructive notice derivable from a legally registered mortgage, for the alleged reason that the certifying justice at the date of the acknowledgment was treasurer of the bank. To be sure, a grantee cannot lawfully take the acknowledgment of his grantor: *Beaman v. Whitney*, 20 Me. 413. But the statute does not in terms require an acknowledgment to be made before a disinterested justice of the peace. And the authorities concur in declaring the act purely ministerial, and in no wise judicial: *Lynch v. Livingston*, 6 N. Y. 422. But without passing upon the question whether an officer of a corporation may take the acknowledgment of its grantor, but assuming that the legal conclusion contended for will follow, the objection cannot avail the plaintiff, for the reason that there is no evidence that the justice was treasurer at the date of his certificate. We therefore perceived no legal objection to the mortgage or its registration." An acknowledgment may be taken by an officer of a corporation whose duty is to countersign and register its deeds: *Sawyer v. Cox*, 63 Ill. 130.

² *Jones v. Porter*, 59 Miss. 628. And see *Tavener v. Barrett*, 21 W. Va. 656.

³ *Bennett v. Shipley*, 82 Mo. 448. See, also, *Black v. Gregg*, 58 Mo. 565; *Siemers v. Kleeburg*, 56 Mo. 196; *Darst v. Gale*, 83 Ill. 136. A deed was made to "L. Triplett, Jr." as trustee, and in the certificate of the notary taking the acknowledgment was described as "L. Triplett, Jr.", but the certificate was signed simply "L. Triplett, N. P." It was decided it did not appear that the notary was the same person as the trustee: *Corey v. Moore*, 86 Va. 721; 11 S. E. Rep. 114.

not take the acknowledgment of it, it is difficult to say how far he may be remotely and indirectly interested and still not be disqualified. The fact that the officer is so related to the parties as to disqualify him from acting as a judge or juror in a case upon trial where they should be parties will not disqualify him from taking an acknowledgment of a deed.¹ Nor is an officer disqualified, by reason of his relationship to the parties, from taking the acknowledgment of a deed from his father to his wife.² Where a mortgage is made to a married woman, the acknowledgment is not invalid because it is taken before her husband.³ An acknowledgment may be taken by an officer who is a nephew and attorney of a person interested in procuring the deed, where such interest consists merely in the presidency of a bank, which is the real party in interest, and in being a surety on an official bond of the grantor, against loss on which the bank has agreed to indemnify him, although such relationship would disqualify the officer under a statute from acting as judge.⁴ The fact that the officer is a partner does not disqualify him.⁵ If the signature of an officer of a corporation is not necessary to the validity of a deed, it is said he may take the acknowledgment.⁶

¹ *Lynch v. Livingston*, 6 N. Y. 422; 8 Barb. 463.

² *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

³ *Kimball v. Johnson*, 14 Wis. 674. But see, *contra*, *Jones v. Porter*, 59 Miss. 628.

⁴ *First National Bank of Helena v. Roberts*, 9 Mont. 323; 23 Pac. Rep. 718.

⁵ *Brereton v. Bennett*, 15 Col. 254; 25 Pac. Rep. 310.

⁶ *Sawyer v. Cox*, 63 Ill. 130, 135. The court said: "It is objected that the deed from the railroad company to appellee was not properly acknowledged. Appellant's counsel has not suggested, nor can we perceive how the company could have otherwise acknowledged the deed; nor do we see any force in the objection that Daggy took the acknowledgment and made the certificate. He at most but attested the execution of the deed, and, like any other witness, could take the acknowledgment, if an officer authorized by law. We have no evidence that the by-laws of the company require it to be attested by him as one of the steps necessary to the validity of the deed." In *Wardlaw v. Mayer*, 77 Ga. 620, 624, it is said: "Although Mr. Myerhardt was the attorney at law of Mayer, Son & Co. (the mortgagees), both before and after the execution of the

An attorney may take an affidavit to be used in the action in which he is attorney.¹ In most of the cases where this point has arisen, the question has been as to the effect to be given to the acknowledgment to enable the registration of the deed to impart notice, but it would seem that where the acknowledgment was an essential part of the deed, as in cases of conveyances executed by a married woman, an acknowledgment taken by an agent or officer of the grantee would be as fatally defective as if taken by the grantee himself.² It is said that where the officer taking the acknowledgment is related to the grantor, or is interested in the deed, the acknowledgment is not void, but voidable merely, and that, when attacked, the court will readily hear any evidence supporting the claim of undue advantage, fraud, or oppression arising from the fact of relationship or interest.³

§ 478. Effect of taking acknowledgment by party.—

The fact that an acknowledgment is taken by a party to the conveyance does not invalidate the deed. It is good between the parties, and those who have actual notice of its existence.⁴ But such a deed is not properly

mortgage, yet by express agreement of the parties, he acted as the attorney of both in the preparation of that instrument, and his action in doing so was rather that of a clerk or notary, in reducing to writing the contract agreed upon between them, than of a lawyer advising the character and form of the security given for the debt by one to another; they arranged this for themselves, and did not consult him or follow his advice in the matter. His attestation to the deed as a notary public was ministerial, and not judicial, or *quasi* judicial in its character, and was a good and valid attestation, entitling the paper to record under the law." See, also, *Bank of Benson v. Hove*, 45 Minn. 40; *National Bank of Fredericksburg v. Conway*, 1 Hughes, 73; 14 Nat. Bank. Reg. 513.

¹ *Reavis v. Cowell*, 56 Cal. 588.

² See *Merced Bank v. Rosenthal*, 99 Cal. 47, where this is intimated, but not decided.

³ *Cooper v. Hamilton Perpetual Building and Loan Assn.*, 37 S. W. Rep. 12.

⁴ *Beaman v. Whitney*, 20 Me. 413; *Hogans v. Carruth*, 18 Fla. 587; *Dussaume v. Burnett*, 5 Iowa, 103; *Stevens v. Hampton*, 46 Mo. 404, 408; 10 Am. Law Reg. (N. S.) 107; *Caldwell v. Head*, 17 Mo. 561; *Cooley v. Rankin*, 11 Mo. 647; *Hainey v. Alberry*, 73 Mo. 427; *Black v. Gregg*, 58 Mo. 565.

acknowledged, and this affects its right to registration. A deed must be properly acknowledged before it is entitled to be recorded, and if not so acknowledged the fact that it may be spread upon the records, is not sufficient to charge subsequent purchasers with constructive notice.¹ Upon the question of the acknowledgment as affecting the right of record, and the extent to which a deed acknowledged before a party to it is, when recorded, constructive notice, the Supreme Court of Missouri lays down the following as a reasonable rule: "When the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face, it is the duty of the register to receive and record it, and its record operates as notice, notwithstanding there may be some hidden defect."²

§ 479. Length of acquaintance with person making acknowledgment.—The officer taking the acknowledgment is required to certify that the person executing the instrument is known to him. But the question of acquaintance is one to be determined solely by the officer's conscience. If the party who makes the acknowledgment is introduced to the officer by a mutual acquaintance, the introduction, if it satisfies the conscience of the officer, is sufficient to authorize him to take and certify the acknowledgment.³ It is said by Cardozo, J.: "The

¹ *Lessee of Schutz v. Moore*, 1 McLean, 520; *Stevens v. Hampton*, 46 Mo. 404; *Hastings v. Vaughn*, 5 Cal. 315; *Dussaume v. Burnett*, 5 Iowa, 95; *Barney v. Sutton*, 2 Watts, 31; *Johns v. Scott*, 5 Md. 81.

² *Stevens v. Hampton*, 46 Mo. 404, 408.

³ *Wood v. Bach*, 54 Barb. 134; *Neppell v. Hammond*, 4 Col. 211. And see *Watson v. Campbell*, 28 Barb. 422; *Jones v. Bach*, 48 Barb. 568. In the latter case it was held that a mere introduction at the time is not sufficient to enable an officer to say that he knows the person who makes the acknowledgment; and that where the officer had no previous knowledge of the party, it was necessary for him to take satisfactory evidence under the solemnity of an oath of the identity of such person. But it was decided in the same case under the name of *Wood v. Bach*,

statute requires that an officer taking an acknowledgment shall know, or have satisfactory evidence that the person making such acknowledgment is the individual described in and who executed the conveyance; but it nowhere prescribes either how such knowledge shall have been acquired, nor that it must have existed for any definite period of time. That being so, who shall fix a rule by which it shall be determined whether the commissioner was justified either by the length of his acquaintance, or the method of forming it, in certifying that he knew the party? Must it not necessarily be a question for the conscience of the officer taking the acknowledgment, and is not that just where the statute meant to leave it, if there was anything at all upon which the officer's conscience could be called upon to act? As no specific period of prior acquaintance is fixed by the statute, who shall say that one month would not be sufficient, if the officer taking the acknowledgment so regarded it? And if one month, why not an hour, or the moment at which the acknowledgment is taken? It is clear that the right to take the acknowledgment does not depend upon the length of the officer's acquaintance with the person. Is that right dependent on the manner in which the officer's knowledge is acquired? The statute does not say so. The means through which the officer obtains knowledge of the person's identity are not material. One officer might consider a person known to him through a method that another might entirely reject. But in this case the usual means of knowledge were acted on, and received by the officer as sufficient. Knowledge of persons and their identity is most frequently acquired by introduction through mutual friends, and, when such introduction has taken place, the parties certainly know each other. Every day, men in social life, thus become known to each other, and I never heard that such an introduction was not sufficient, or that any length of time

54 Barb. 143, that a mere introduction was sufficient, and the decision made in the case of *Jones v. Bach* was overruled.

after it must elapse to justify a statement or certificate that they were acquainted. When an introduction does not proceed from such a source as satisfies the officer's conscience, undoubtedly he should not certify that he knows the party, but should require 'evidence,' which of course must be on oath; but where the character of the introducer—whom the officer knows—conveys knowledge to the officer's conscience, he may well be satisfied, and may properly give his certificate."¹

§ 480. **Comments on this rule.**—We have given the quotation in the preceding section because, in our opinion, it is a concise and forcible presentation of the proper rule. The means that the officer takes to ascertain the identity of the person appearing before him to acknowledge the execution of an instrument can make no difference to any one, unless he should commit an error as to identity. But so far as the *validity* of the acknowledgment is concerned, and that is the question which we are now considering, it is immaterial how he acquires his knowledge of the person making the acknowledgment. Another and different question may arise as to the extent of an officer's liability, who had certified that he knew a person from a simple introduction, without attempting to obtain further assurance by declarations made under the sanc-

¹ Wood v. Bach, 54 Barb. 134. To the objection that this rule might lead to fraud and imposition upon the officer, the learned justice responded: "I do not think the suggestion that allowing acknowledgments to be taken under such circumstances may lead to frauds and false personations, entitled to much weight. Certainly, when the officer relies upon the introduction made by a friend whom he knows, there is not more danger of imposition than when he acts upon oath, as he may do of an entire stranger. If parties desire to personate others, there is much more probability of it being done through the medium of an oath of a stranger, experience having shown that persons willing to commit perjury for such purposes are not difficult to be found, than that it will be accomplished through the instrumentality of an introduction by a respectable friend to a reputable officer; while, again, if the officer himself be corrupt, requiring that he shall take evidence will not prove much more of a safeguard than if he certified without proof." See, also, Rexford v. Rexford, 7 Lans. 6; Nippel v. Hammond, 4 Col. 211.

tion of an oath. He has the right to require that the identity of a person shall be established to his satisfaction by the oath of a credible witness. If he chooses to act upon the statement of an acquaintance without compelling him to testify, and thus having the right to subject him to punishment if he testifies falsely, it might be well said that the officer is guilty of negligence, and should be liable for any injury which might result in case he had been imposed upon. But, however this may be, it is certain that if he is satisfied that he knows a person, and is willing to so state in his certificate, it is immaterial during what length of time the acquaintance existed. Supporting, also, this view, is a case where the husband and notary were well acquainted with each other, and the wife was introduced to the officer by the husband at the latter's house, it was held that it was not necessary to prove the identity of the wife to the officer, but that, if he had knowledge from a source that satisfied his conscience, it was sufficient.¹

§ 481. Omission of date does not invalidate acknowledgment.—If the certificate of acknowledgment is sufficient in other respects, the want of a date will not vitiate it.² Where a statute prescribes the time within which a deed shall be recorded, and the deed is recorded within the statutory time, but the year in which the deed was acknowledged is omitted from the certificate, the legal inference was said to be that it was legally acknowledged.³ In the absence of all proof to the contrary, it will be presumed that a deed was acknowledged at the place at which it purports to have been executed, and at the time it bears

¹ *Nippel v. Hammond*, 4 Col. 211.

² *Irving v. Brownell*, 11 Ill. 402; *Webb v. Huff*, 61 Tex. 677; *Rackleff v. Norton*, 19 Me. 274; *Doe ex dem. Trulock v. Peeples*, 1 Ga. 3; *Wickes v. Caulk*, 5 Har. & J. 36; *Yorty v. Paine*, 62 Wis. 154; *Caruthers v. McLaran*, 56 Miss. 371; *Sidwell v. Birney*, 69 Mo. 146; *Horsley v. Garth*, 2 Gratt. 471; 44 Am. Dec. 393. See, also, *Kelly v. Rosenstock*, 45 Md. 389; *Pierce v. Brown*, 24 Vt. 165; *Chase v. Whiting*, 30 Wis. 544.

³ *Wickes v. Caulk*, 5 Har. & J. 36.

date.¹ In Maryland, the code, which makes an acknowledgment essential to the validity of a mortgage, declares that the certificate of acknowledgment shall, among other things, state "the time when it was taken." In a late case in that State it was held that when attack is made upon a deed for want of definiteness in this particular, reference may be had not only to the certificate, but to the entire instrument, or to any part of it, and that the certificate of the clerk and the indorsement of the recording officer are to be regarded as parts of the instrument to which the court may refer.² A certificate to the wife's

¹ Doe ex dem. Trulock v. Peeples, 1 Ga. 3; Rackleff v. Norton, 19 Me. 274. In the former case, Warner, J., delivering the opinion of the court, said: "This court will presume the acknowledgment was made in the county where the deed purports to have been made, and at the time it purports to bear date, in the absence of *all proof to the contrary*. We shall not voluntarily impute *malpractice* to the officer before whom the acknowledgment was made, by presuming it was taken at a time and place when and where he had no authority to take it." See Hobson v. Kissam, 8 Ala. 357.

² Kelly v. Rosenstock, 45 Md. 389. The court said: "On its face the mortgage bears date the 6th of August, 1872, professes to have been *executed on that day*, is duly attested, the attesting witness being the magistrate before whom the acknowledgment was taken, and it refers to the lease as bearing even date with it. The acknowledgment was before a magistrate in Baltimore City, who therein certifies 'that on this — day of August, A. D. 1872, before me, the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared David W. Caskey, and acknowledged the foregoing mortgage to be his act,' and that, at the same time, also personally appeared before him the mortgagees, and made oath that the consideration of the mortgage 'is true and *bona fide* as therein set forth.' Then follows a certificate of the clerk of the superior court, dated the 6th of August, 1872, that the party 'before whom the annexed *acknowledgment and affidavit were made* was, *at the time of so doing*,' a duly commissioned and sworn justice of the peace of the State, in and for the city of Baltimore. The instrument also bears the indorsement, 'recorded August 6, 1872, and examined,' placed thereon by the clerk of the Circuit Court for Baltimore County, in which county the lots were situated. From these facts appearing on the face of the instrument itself, it is clear the acknowledgment could have been taken on no other day than the 6th of August, 1872. They definitely establish the fact, that it could not have been made before or after that date. By the code, acknowledgment is made essential to the validity of a mortgage, and article 24, section 8, declares that the certificate of acknowledgment 'shall contain,' among other things, 'the time when it was taken.' But when a deed is attacked,

acknowledgment reciting that the wife appeared and acknowledged the deed on the same date as her husband's acknowledgment, and then affirming that the certificate was made on a previous day, shows that the date in the body of the certificate is the true one, and that the second date is clearly a mistake.¹

§ 482. **Omission to state the place of taking the acknowledgment.**—It is not absolutely essential that the place where the acknowledgment is taken should appear from the certificate itself. If an inspection of the whole instrument will enable this fact to be ascertained, it is sufficient.² A certificate of acknowledgment, for instance, did not show in what State the acknowledgment was taken, but in the deed the grantor was described as a "resident of Suffield, in the county of Hartford, and State of Connecticut." The acknowledgment which was made two days after the date of the deed simply gave the name of the county, omitting that of the State. The court said: "It is

for want of definiteness on this subject, the court is not confined to the certificate, but may refer to the entire instrument, or to any part of it. This principle was clearly laid down by the supreme court in *Carpenter v. Dexter*, 8 Wall. 526. 'In aid of the certificate (say the court in that case), reference may be had to the instrument itself, or to any part of it.' To determine whether it conforms to the law, it is to be read in connection with the deed itself.' The certificate of the clerk, in a case like this, and recording, are made by the same article of the code just as essential as acknowledgment. We, therefore, regard the certificate of the clerk, and the indorsement of recording as forming parts of the instrument to which reference may be thus made. By reading the acknowledgment in this connection, the day of taking it appears as certainly as if it were written out in the certificate itself; and this, in our opinion, gratifies the requirements of the law. In so deciding, we in no wise disturb any previous adjudications in this State upon that or like questions. Confining, as we do, our decision to the case before us, we by no means intimate an opinion that evidence, extrinsic to the deed, could be resorted to in order to fix the date, or that the acknowledgment would be valid, if, from the face of the instrument, there was room for any uncertainty as to the day on which it was taken." See, also, *Bradford v. Dawson*, 2 Ala. 203; *Dickerson's Heirs v. Talbot*, 14 Mon. B. 60.

¹ *Homer v. Schonfeld*, 84 Ala. 313.

² *Fuhrman v. Loudon*, 13 Serg. & R. 386; 15 Am. Dec. 608; *Brooks v. Chaplin*, 3 Vt. 281; 23 Am. Dec. 209; *Trulock v. Roe*, 1 Ga. 3; *Rackleff v. Norton*, 19 Me. 274.

not indispensable that the place of taking should fully appear from the acknowledgment itself, provided it can be discovered with sufficient certainty by inspection of the whole instrument. And if we can infer beyond reasonable doubt that the acknowledgment indorsed upon this deed was taken in the county of Hartford, and State of Connecticut, it is to be regarded as a legal acknowledgment, it being in proper form, and taken by a magistrate of competent authority by the laws of that State. We deem it a fair presumption, in the absence of all evidence to the contrary, that the deed was executed at the time it bears date, and at the place of the grantor's residence. And finding the acknowledgment taken so soon afterward in the county of Hartford, we can intend no other than the same county of Hartford, in which the deed is supposed to have been executed. Questions of this sort have frequently arisen, and have always received a similar determination, when the instrument has furnished equal means for ascertaining the place of acknowledgment."¹ Where the grantors are described in the body of the deed as of a particular county, a certificate of acknowledgment which purports to be made by a justice of the peace of *said county*, but without mentioning the county by name, is good.² But in order that a deed may be read in evi-

¹ Per Royce, J., in *Brooks v. Chaplin*, 3 Vt. 281; 23 Am. Dec. 209. This case is cited with approval in *Carpenter v. Dexter*, 8 Wall. 513, 529, and Judge Field, in delivering the opinion of the court in the latter case, says: "There is good sense in this decision."

² *Fuhrman v. Loudon*, 13 Serg. & R. 386; 15 Am. Dec. 608. The opinion of the court was delivered by Tilghman, C. J., who said: "In order to show that no right of dower was outstanding, the plaintiff produced a deed from Roop and wife, acknowledged before John Adams, styling himself a justice of the peace, to which the defendant's counsel objected, because it was not said in the certificate of the acknowledgment of what county or State Adams was a justice. But the court overruled the objection and admitted the deed in evidence. The certificate was headed — County, ss., and then went on to say: 'Before me, one of the justices of the peace for *said county*, personally came *the above-named Jacob Roop and Susanna*, his wife, and acknowledged the above indenture,' etc. Now, it would seem that the words 'for the said county,' were intended to refer to the county mentioned in the body of the deed; because in another part of the certificate, where it is said that *the above-named Jacob*

dence without proof of its execution, it is essential that the certificate should contain some assignable locality of which the court can take judicial notice; and a defect of this character, it is held, is not cured by the notarial seal.¹

§ 483. **When certificate does not show in what State acknowledgment was made.**—In a case in Illinois, where the venue to the certificate of acknowledgment was simply “county of New York,” and there was nothing in the body of the deed to indicate in what State the acknowledgment was taken, it was held that the acknowledgment was insufficient.² The court in that case was of the opinion that it either must appear from the acknowledgment itself where it was made and certified, or by a comparison of the deed and acknowledgment, the court must be able to presume in what State it was taken. But in a later case the same acknowledgment came before the court, and on this occasion there was a certificate of a magistrate

Roop and Susanna, his wife, appeared before the justice, reference must certainly have been intended to the body of the deed, no mention of Roop and wife having previously been made in any other place. The exception is not to be favored, as it cannot be seriously supposed that Adams would have undertaken to receive the acknowledgment of a deed relating to lands in Pennsylvania, if he had not been a justice of the peace for some county in the State, and if a justice of any county, it was sufficient. At the time of taking this acknowledgment, any justice of the peace was authorized to take the acknowledgment of a deed affecting lands in any part of the State. I am of opinion, therefore, that the exception was not good, and the deed was properly admitted in evidence.” See, also, *Dunlap v. Daugherty*, 20 Ill. 397.

¹ *Vance v. Schuyler*, 1 Gilm. 160. In that case the acknowledgment was in the following form: “Lincoln, ss., Wiscasset, July 22, 1818. Personally appeared before me, Seth Tinkham, Notary Public, by legal authority appointed and sworn, dwelling in Wiscasset, aforesaid, Spencer Nelson, and acknowledged the above instrument in writing by him subscribed to be his free act and deed, for the purpose therein mentioned; and requested that the same might be received and taken as such; and also made oath that he is the same person to whom the within patent was granted. In testimony whereof I have hereunto set my hand and affixed my seal of office, the day and year first above written. Seth Tinkham, Notary Public. [Seal.]” The court said: “‘Lincoln, ss., Wiscasset,’ judicially have no assignable locality, and the seal affixed will not help it.”

² *Hardin v. Kirk*, 49 Ill. 153; 95 Am. Dec. 581.

which was entitled, "State of New York, city and county of New York, ss.," and to the effect that "the officer at the time of taking the acknowledgment was a commissioner of deeds for the city and county, residing therein, commissioned, sworn, and duly authorized to take acknowledgments, and that his signature was genuine." The court, while adhering to its former decision, held that this second certificate cured the defect, observing: "By force of the two certificates, we must presume that the acknowledgment was taken in the State of New York, and in the county of New York. There the commissioner resided, and the legal presumption is that he acted in the place where he had jurisdiction. It would be an unreasonable and violent conclusion, that an officer attempted the discharge of his duty in some other State other than the one in which he was authorized to act."¹

§ 484. Proof of locality in which officer had jurisdiction.—If the certificate of acknowledgment does not state the place where it was taken, and this fact cannot be gathered from other parts of the deed, it may be supplied by parol proof that he was an acting officer at the place at the time when the acknowledgment was taken.² Where the certificate of the acknowledgment of a deed, purporting to have been made by the clerk of a court of record, was formal in every other respect than the omission of the name of the county in the caption or margin, and which stated that it was given under the hand of the officer and the seal of the court, the seal containing the name of the county being affixed, it was held that the acknowledgment appeared to have been taken in the proper county, and the omission of the name of the county in the certificate did not vitiate the certificate.³

¹ *Hardin v. Osborne*, 60 Ill. 93, 96, per Thornton, J.

² *Scott v. Gallagher*, 11 Serg. & R. 347; 16 Am. Dec. 508; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89. And see *Irving v. Brownell*, 11 Ill. 402; *Shattuck v. The People*, 4 Scam. 481.

³ *Chinquy v. Catholic Bishop of Chicago*, 41 Ill. 148. In that case the conclusion of the certificate was "given under my hand and seal of said

§ 484 a. **Stating name of county.**—Where the certificate recites the name of the county of the notary taking the acknowledgment, it is not necessary for him to sign himself notary public for such county.¹ If it appears by a certificate from the executive department that a person purporting to have signed a deed as a witness in the capacity of a justice of the peace was not in commission in the county where such deed purports to have been made at the date of its execution, a presumption arises that it was forged.² A certificate which fails to show of what county the officer was a justice, or whether he was justice of any county, or in what county or state the acknowledgment was taken, is fatally defective.³ If a certificate of acknowledgment shows the county in which it was taken, the presumption is that the officer is authorized to act in the county named, though it does not appear by his certificate that he is an officer for the county.⁴

§ 485. **Treating two certificates as one.**—It is proper in some cases to treat two certificates as one, where they appear to have been made at the same time and for the same purpose, and the defects of one may be thus supplied by reference to the other. For example, two certificates were attached to a deed, one of which was made by the grantor, and the other, which was placed directly under it, was made by his wife. Both certificates were in proper form with the exception that the signature of the justice who took the acknowledgment appeared only on the bottom of the lower one, and that they failed to state the county for which he was a justice, although each contained the caption of the State and county. The court held that the two certificates were to be treated

court, this twelfth day of July, A. D. 1851," and the seal contained the words, "Will county seal."

¹ Colby v. McOmer, 71 Iowa, 469.

² Parker v. Waycroff etc. Co., 81 Ga. 387.

³ Emeric v. Alvarado, 90 Cal. 444.

⁴ Chamberlain v. Pybas, 81 Tex. 511.

as one, and that such officer was a justice was evident from the caption and signature.¹

§ 486. **Presumption that acknowledgment was taken within jurisdiction of officer.**—It is not necessary that the certificate should state that the acknowledgment was taken within the jurisdiction of the officer. Where a conveyance is acknowledged before an officer who has authority to take the same within a particular locality, it will be presumed that he took the acknowledgment within the limits of his jurisdiction.² “The officer was entitled to take the acknowledgment, and it must be presumed that he did it within the limits of his jurisdiction, even though that is not stated to have been the case in the certificate which he made, for the legal presumption is in favor of the validity of the acts of public officers,

¹ *Wright v. Wilson*, 17 Mich. 192. Christiancy, J., delivered the opinion of the court, and said: “The circuit judge held the certificates of acknowledgment to be in effect one certificate only, and the signature at the end of the last as intended to be a signature to both, and that the caption of the certificate and the signature import that such officer was an officer in and for the county named in the caption. In this we see no error. The strong probability is that the blank for the deed was one which had the acknowledgment of the wife in form separate from that of the husband; and the former being placed directly under the latter, was treated by the justice as in effect but a single certificate, the signature to the last being considered by him as a signature to the whole. The fact that such certificates of acknowledgment are generally made as one, that the blank for the date in the first was filled as in the last, and with the same date, and that the justice appears to have signed as a subscribing witness to the execution by both, all tend to confirm this view. And we think the court was entirely right in holding that when the county is named in the caption of such certificate, and it is signed officially as justice of the peace, the caption in connection with such official signature imports that he is such officer in and for the county named in the caption.”

² *Bradley v. West*, 60 Mo. 33; *Sidwell v. Birney*, 69 Mo. 144; *Morrison v. White*, 16 La. Ann. 100; *Carpenter v. Dexter*, 8 Wall. 513; *Rackleff v. Norton*, 19 Me. 274; *Dunlap v. Daugherty*, 20 Ill. 397; *Thurman v. Cameron*, 24 Wend. 87; *Blythe v. Houston*, 46 Tex. 67; *Oney v. Clendenin*, 28 W. Va. 34; *People v. Snyder*, 41 N. Y. 397; *Owen v. Baker*, 101 Mo. 407; 20 Am. St. Rep. 618; *Huxley v. Harrold*, 62 Mo. 516; *Williams v. Kerr*, 113 N. C. 306; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89; *Bensemer v. Fell*, 35 W. Va. 15; 29 Am. St. Rep. 774.

where nothing appears warranting a different conclusion.”¹ A certificate of acknowledgment to a deed was in this form: “State of Missouri, Schuyler County, ss: Be it remembered that before the undersigned, circuit clerk, comes Lyttleton H. Conklin,” etc. An objection was made to the acknowledgment that it did not appear of what county the officer making it was circuit clerk, but the court held that it sufficiently appeared that the acknowledgment was taken in Schuyler County by the clerk of the circuit court, and that it would be presumed that he exercised his functions within his jurisdiction.²

§ 487. Jurisdiction of officer.—The matters required to be stated in the certificate of acknowledgment, and the extent of territory in which the officer is authorized to act, are matters for statutory regulation. In a case where it was held that after taking the acknowledgment, and making and delivering the return, the functions of the officer ceased, and he had no authority to amend or alter his certificate, it was remarked, as a reason for the decision: “A notary derives his power from the statute over

¹ *The People v. Snyder*, 41 N. Y. 397, 402, per Daniels, J.

² *Sidwell v. Birney*, 69 Mo. 144. Hough, J., speaking for the court, said: “The objection to the acknowledgment is, that it does not appear to have been taken before any officer known to the laws of this State; and that it does not appear of what county the officer making the certificate was circuit clerk. ‘Circuit clerk’ is the title by which the clerk of the circuit court is ordinarily designated, both by lawyers and laymen, and while, as an official designation, it is not rigorously exact, yet being in common use and reasonably certain, we are of opinion that it sufficiently identifies the officer taking the acknowledgment as the clerk of the circuit court. We are also of the opinion that it sufficiently appears from the face of the certificate, that the person taking the certificate was circuit clerk of Schuyler County. The venue of the certificate is ‘State of Missouri, Schuyler County.’ This shows that the certificate was granted in Schuyler County, and the presumption is that the officer exercised his functions within the limits of his jurisdiction.” A notary public who took an acknowledgment of a deed conveying land in Livingston County, described himself in the certificate as a notary public within and for the county of Livingston, but to his signature added the words “Notary Public, Howard County.” The deed was held to be admissible in evidence: *Merchants’ Bank of St. Louis v. Harrison*, 39 Mo. 433; 93 Am. Dec. 285.

these subjects. The special duty and authority of taking and certifying acknowledgments is given him. But he acts as an officer with a special authority for each particular case. He is, in other words, acting as under a special commission for that case—clothed with a limited statutory power.”¹ Hence, to determine whether an officer can take an acknowledgment outside of his county or not, reference must be had to the statutes of the State in which he acts. In the various statutes defining the powers and duties of officers authorized to take acknowledgments, provisions may be found that the acknowledgment shall be taken in the county where the land is situated, or where the grantor resides, or in the county or district for which the officer is appointed. In order that the acknowledgment may be valid, compliance with these statutory provisions is essential.² But it is held in other States that the right to take an acknowledgment is personal to the officer, and not dependent upon his being in the county

¹ *Bours v. Zachariah*, 11 Cal. 281, 292; 70 Am. Dec. 779.

² *McCullock v. Myers*, 1 Dana, 522; *Johns v. Reardon*, 3 Md. Ch. 57; *Gittings v. Hall*, 1 Har. & J. 14; 2 Am. Dec. 502; *Garrison v. Haydon*, 1 Marsh. J. J. 222; 19 Am. Dec. 70; *Dickerson's Heirs v. Talbot's Executors*, 14 Mon. B. 60; *Hedger v. Ward*, 15 Mon. B. 106. In *Hughes v. Wilkinson's Lessee*, 37 Miss. 482, 489, the court say: “The acknowledgment was made in the year 1831, and by the statute then existing a justice of the peace was not empowered to take an acknowledgment of a deed of conveyance of lands, unless they were situate wholly or in part in the county in which he held his office: Hutch. Code, 605, § 1. Notaries public were afterward authorized by the Act of 1833 to take acknowledgments out of the county of their residence (Hutch. Code, 617); and by the Act of 1836, justices of the peace were authorized to exercise all the powers previously belonging to notaries public: Hutch. Code, 704, art. 15. But these last two statutes were passed after the acknowledgment under consideration was made, and, of course, can have no effect upon it; and the conclusion is unavoidable, that the acknowledgment was not according to law, and consequently that the power of attorney was not properly recorded, so as to give the record the force of evidence.” In *Hedger v. Ward*, 15 Mon. B. 106, it was held that, prior to the Act of 1810, clerks of county courts had no authority to take the acknowledgment of deeds for land which did not lie in their counties; but as the deed in question was nearly fifty years old, permission was given to read it as evidence in favor of the heir of the grantee, without proof of its execution. See *Colton v. Seavey*, 22 Cal. 496.

for which he was appointed. And where this view prevails, an acknowledgment may be taken by an officer out of his county.¹

§ 488. **Comments.**—As the question of whether an officer can take an acknowledgment out of his county or not is one of statutory construction, dependent for determination upon the language of the statute itself, it is impossible to lay down any rule of general application. Where the statute declares in so many words that an officer can take an acknowledgment only within certain limits, there is, of course, no room for construction. But where the statute confers upon him a general power, without prescribing the territory within which it is to be exercised, or designates the territory without declaring that his power shall not extend beyond it, it seems to us that the power should be considered personal, and that he may exercise it wherever he may happen to be. If a bond be required of him, he would be liable to as great an extent for a violation of his official duties for an act performed out of his county, as he would be for one done within it. No good reason presents itself to our mind why peculiar dignity should attach to the taking of an acknowledgment within a particular locality by one who possesses the power to take it, and no effect whatever be given to it when taken elsewhere. The act of taking an acknowledgment is, as we have seen, purely ministerial, and possesses no feature of a judicial nature. Therefore, we think that where the language of the statute is not plain and prohibitory, an officer may take an acknowledgment outside of the district in which he resides, or for which he is appointed.

¹ *Learned v. Riley*, 14 Allen, 109; *Biscoe v. Byrd*, 15 Ark. 655; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Lessee of Moore v. Vance*, 1 Ohio, 1; *Lessee of Kinsman v. Loomis*, 11 Ohio, 475; *Moore v. Moore*, 3 Ohio St. 154; *Odiorne v. Mason*, 9 N. H. 24. See, also, *Henderson v. Robinson*, 76 Iowa, 603. But see *Jackson v. Humphrey*, 1 Johns. 498; *Share v. Anderson*, 7 Serg. & R. 43; 10 Am. Dec. 421.

§ 489. **Officer if required by statute must attach seal to certificate.**—Wherever an officer is required to have a seal, and to attach it to his official acts, a certificate of acknowledgment without the seal of the officer before whom the acknowledgment was taken is invalid.¹ The seal connects the instrument with the person who possesses the official power of taking an acknowledgment. It shows that the certificate came from the proper authority. It is the means provided to give recognition and credit to the certificate as the official act of the officer by whom it purports to be made. "A notary's acts," says Chief Justice Caton, "should always be attested by a notarial seal, which every notary is presumed in all countries to have."² But expressions of this kind are sometimes too broad, and care should be taken to apply them to the facts before the court. In a case in California, the court, speaking of the absence of a seal to the notary's certificate of acknowledgment, said: "The statute requires it as a pre-

¹ *Hastings v. Vaughn*, 5 Cal. 315; *McCreary v. McCreary*, 9 Rich. Eq. 34; *Booth v. Cook*, 20 Ill. 129; *Richards v. Randolph*, 5 Mason, 115; *Holbrook v. Nichol*, 36 Ill. 161; *Little v. Dodge*, 32 Ark. 453; *Blagg v. Hunter*, 15 Ark. 246; *Miller v. Henshaw*, 4 Dana, 325; *Buell v. Irwin*, 24 Mich. 145; *Meskimen v. Day*, 35 Kan. 46; *McKellar v. Peck*, 39 Tex. 381; *King v. Russell*, 40 Tex. 124; *Masterson v. Todd*, 6 Tex. Civ. App. 131; *Ballard v. Perry*, 28 Tex. 347; *Skinner v. Fulton*, 39 Ill. 484; *Robinson v. Robinson*, 116 Ill. 250; *Moore v. Titman*, 33 Ill. 358. And see *Kemper v. Hughes*, 7 Mon. B. 255; *Texas Land Co. v. Williams*, 51 Tex. 51; *Barney v. Sutton*, 2 Watts, 31; *Duncan v. Duncan*, 1 Watts, 322; *Ingoldsby v. Juan*, 12 Cal. 564.

² *Booth v. Cook*, 20 Ill. 129, 132. In *Ballard v. Perry*, 28 Tex. 347, 364, the court say: "The deed was also objected to for want of a seal to the notary's certificate of probate. The objection, if established, should have been sustained. The instrument offered in evidence was not the deed itself, but a certified copy of it, from the records of the office of the county clerk. The fact cannot, therefore, be determined by an inspection of the paper presented to the court. But as the certificate of the notary declares that he has affixed his official seal to it, and the clerk should not have recorded the deed unless this were the case, we think that it may be presumed that the seal was properly attached, although in the copy from the record its place is not indicated by a scroll, and the initial letters 'L. S.', as is customary in copies of sealed instruments. The clerk who recorded this deed may not have supposed this necessary or proper."

liminary to the fitness of the deed for registration, and without conforming strictly to the statute, the registration will not have character to charge constructive notice."¹ Speaking of a certificate of acknowledgment to a deed, Chief Justice Treat, of Illinois, says: "The statute imperatively requires it to be under his official seal. It makes the affixing of the official seal an indispensable part of the certificate. Without the seal, the certificate is incomplete and imperfect. It has no validity or efficacy, unless the seal is added. It might as well be insisted that a writ of error issued from this court which was not under the seal of the court would be valid, as to say that a certificate of acknowledgment by a notary need not be evidenced by his notarial seal. The same authority that requires the process to be under the seal of the court, directs the certificate to be under the official seal of the notary. The courts have no more power to dispense with the requirements of the statute in the one case than in the other. It is only by force of the statute that the certificate of a notary has any effect as evidence of the execution of a deed; and the statute requires it to be under the official seal of the officer. A certificate which is not verified by his seal of office, derives no force or efficacy from the statute. We cannot say that the seal is a mere formality and adds nothing to the dignity or solemnity of the instrument. It is enough that the law positively requires it. The propriety of the requisition rests with the legislature."² Where the acknowledgment purports to have been made in one county, while the only seal attached to the certificate is the officer's seal as a notary public of another county, the certificate is insufficient to render the record of the deed constructive notice to a subsequent purchaser.³

¹ *Hastings v. Vaughn*, 5 Cal. 315, 318. But the deed should be admitted in evidence with proper instructions to the jury as to its effect in giving notice to third persons.

² In *Mason v. Brock*, 12 Ill. 273, 276; 52 Am. Dec. 490. See *Davis v. Roosevelt*, 53 Tex. 305.

³ *Emeric v. Alvarado*, 90 Cal. 444.

§ 490. **Where there is no statutory provision.**—Where, however, there is no provision in the statute requiring that a seal shall be affixed to the certificate of acknowledgment, none is necessary. Mr. Justice Wilde, in a case in which this point was raised, said: "The statute requires no notarial seal to the notary's certificate of the acknowledgment, and none, we think, was necessary. The notary derived his authority from the statute, and it is no good objection to the validity of the certificate, that by the common law or law merchant, notaries public are required to certify their acts and doings under their notarial seal."¹ "It is not necessary," says the Supreme Court of Minnesota, "that these official certificates of acknowledgment should be under seal unless the statute authorizing them expressly requires it. If the certificate styles the officer taking it as an officer authorized by statute to perform the act, it will be *prima facie* evidence of his official character. No seal was required by our act."²

¹ *Farnum v. Buffum*, 4 Cush. 260, 264. The statute may be silent as to the necessity of an officer providing himself with a seal, or prescribing the form to be used. If the statute does not direct that an officer shall use an official seal he may use a private seal: *Tuten v. Gazea*, 18 Fla. 751; *Davis v. Roosevelt*, 53 Tex. 305.

² *Baze v. Arper*, 6 Minn. 220, 229. And see *Thompson v. Morgan*, 6 Minn. 292; *Powers v. Bryant*, 7 Port. 9; *Jacques v. Weeks*, 7 Watts, 261; *Harrison v. Simons*, 55 Ala. 510; *Irving v. Brownell*, 11 Ill. 402; *Thompson v. Robertson*, 9 Mon. B. 383; *Maxwell v. Hartman*, 50 Wis. 660; *Davis v. Roosevelt*, 53 Tex. 305. In *Fund Commissioners of Muskingum County v. Glass*, 17 Ohio, 542, *Hitchcock, J.*, delivering the opinion of the court, said: "The only question raised in this case is whether, where a deed is acknowledged before a notary public, the acknowledgment is void, unless the same is certified under the official seal of the officer taking the acknowledgment. That such acknowledgment is void is earnestly insisted upon by the counsel for the defendant, and they base their argument upon the act 'for the appointment of notaries public,' which took effect May 1, 1816: *Swan's Stat.*, 601. The third section of this act provides that 'each notary shall provide a notarial seal, with which he shall authenticate his official acts,' etc., 'which seal, together with the registers and official documents, shall not be liable to be seized in by execution.' The duties to be performed by the notary are not by the statute prescribed in express terms, but at the close of the second section it is prescribed that 'due faith and credit shall be given to his protestations, attestations, and other instruments of publication.' Taking the whole act

§ 491. Reference to official seal.—If the official seal is in fact attached to the certificate, it is immaterial

together, it is apparent that the duty to be performed by this officer was like the duties to be performed by other officers of the same name, in other parts of the commercial world. He was to keep a register of his proceedings; faith and credit were to be given to his protestations, attestations, and other instruments of publication, and all these were to be 'authenticated by his official seal.' There is nothing in this act about the acknowledgment of deeds. This was no part of the duties to be by the notary performed. By an amendatory act, which took effect February 29, 1836, it is enacted 'that every notary public may hereafter demand and receive for every attestation, protestation, or other instrument of publication, under the seal of his office, the sum of fifty cents, and no more; and for recording in a book to be kept for that purpose, each attestation, protestation, or other instrument of publication, fifty cents, and not more.' This amendatory act, as well as the one to which it is amendatory, shows sufficiently for what purpose the seal was to be used. We have been referred to two cases in Indiana, one reported 4 Blackf. 185, and the other 6 Blackf. 356, which are supposed to have a bearing upon this case, and to be conclusive to show that this acknowledgment is defective. Those cases were decided under the statute of Indiana, and counsel suppose the statute of that state is like our own, but from the cases referred to, and especially the one in 4 Blackf., I should take them to be materially different. By our statute, heretofore referred to, all the certificates of the notary, as to the acts therein contemplated to be done, must be under his official seal. But, as before said, taking the acknowledgment of a deed is not one of those acts. By that law he had no power to perform any such act. This power was conferred upon a notary public by the 'act to provide for the proof, acknowledgment, and recording of deeds and other instruments of writing,' which took effect June 1, 1831: Swan's Stat. 265. The first section of this act, after specifying the manner in which a deed shall be executed, by signing, sealing, etc., provides that 'such signing and sealing shall be acknowledged by such grantor or grantors, maker or makers, before a judge of the supreme court, or of the court of common pleas, a justice of the peace, notary public, mayor, or other presiding officer of an incorporated town or city; who shall certify such acknowledgment on the same sheet on which such deed, mortgage, or other instrument of writing may be printed or written, and shall subscribe his name to said certificate.' Under this law the acknowledgment of this deed was taken, and to the certificate of acknowledgment the officer taking it did 'subscribe his name.' This was all which the law under which he was acting required him to do. I cannot see why we should add anything to this requisition. If the general assembly of 1816 had power, and saw fit to declare that a notary public should verify certain certificates, which he should make, or all he should make, by his official seal, the general assembly of 1831 had equal power to declare that in a given case he might verify a certificate by the mere signature of his name. This has been done in the case of certifying to the acknowledgment of a deed."

whether the officer so declares in the attestation clause or not. In such a case the whole instrument would purport to be an official and not a private act. Thus a certificate of acknowledgment which says "witness my hand and seal" instead of *official seal*, is, if impressed with the notarial seal and purporting to be an official act, sufficient.¹ Where the word "seal" before the words "of office," was omitted, making the attestation clause read, "given under my hand and — of office," the omission was held to be immaterial. On the exception taken to the sufficiency of the certificate of acknowledgment for this omission, the court observe: "It is so evident that it was an accidental omission to put in the word 'seal' between 'and of office,' that the reader would always supply the omission to make sense of the following words of office. It was so evidently an omission of the officer, whose duty it was to make the authentication, that no one could be deceived by it, and the most ordinary understanding would have known the word 'seal' was intended to have filled up the hiatus, that we should have regarded the exception as not sustainable."²

¹ *Monroe v. Arledge*, 23 Tex. 478; *Moore v. Titman*, 33 Ill. 358. In the latter case the court held that a default admitted the sufficiency of the acknowledgment, but said on this point: "It is insisted that the notary public before whom the mortgage was acknowledged failed to affix his official seal. It appears that in the body of his certificate he describes himself as notary public, and a seal is annexed. It is true that in the testing clause to the certificate he says: 'Given under my hand and seal.' If, when the instrument was produced, it appeared that it was his official seal which was annexed, that would be sufficient, as the seal imports verity, and that the act is official, and not individual."

² *Nichols v. Stewart*, 15 Tex. 226, 235. And see *Harrington v. Fish*, 10 Mich. 415; *Webb v. Huff*, 61 Tex. 677. Where the original deed is produced, with the seal of the officer taking the acknowledgment affixed, and it is shown that the officer affixed his seal to the certificate at the time the acknowledgment was taken, the deed is properly of record, and admissible in evidence, notwithstanding the county records show in place of the word "Seal" opposite the notary's certificate of acknowledgment of this deed, the words "no seal on": *Equitable Mortgage Co. v. Kempner*, 84 Tex. 102. Where the acknowledgment, as recorded, indicates by its language that the official seal was affixed, the absence of the seal, or of anything representing it, from the record, or from a transcript of it, is not sufficient to overcome the presumption

§ 492. **Same subject.**—It is proper in this connection to call attention to what apparently is a decision in conflict with the law as stated in the previous section. The attesting clause to the notary's certificate of an acknowledgment of a deed was: "Witness my hand and seal this day," etc. The certified copy before the court contained merely a scrawl. Blodgett, J., said upon the sufficiency of this acknowledgment: "Plaintiff contended that when a notary public says 'witness my hand and seal,' he means his notarial seal. But after an examination of the authorities touching this question, I have come to the conclusion that nothing should be presumed in favor of a notary public's certificate of acknowledgment to a deed of conveyance; he must state all the facts necessary to show a valid official act on his part, and inasmuch as the statute expressly provides that a notary public must authenticate his certificate of acknowledgment to a deed by his notarial seal, it seems clear to me that the certificate itself must expressly affirm and show that he has so authenticated it; in other words, he must state he has affixed his official or notarial seal, and it must appear from the inspection of the original paper that there is such a seal affixed to the deed. In this case, inasmuch as only a certified copy was used, and as the recorder has probably not made a *fac simile* of that seal on the record book of the

arising from such language that the officer's official seal was affixed to the original: *Summer v. Mitchell*, 21 Fla. 179; 30 Am. St. Rep. 106. Under a statute declaring that certificates of the privy examination of a married woman should be substantially in a certain form, the form given concluding with the words "witness my hand and seal (private or official as the case may be)," it was held that where the acknowledgment is taken by a justice of the peace of the county in which the land lies, the provision for the use of a seal is merely directory and not mandatory: *Lineberger v. Tidwell*, 104 N. C. 506. Where the officer declares in his certificate that he has affixed his seal, it is presumed that his seal was properly attached, although its place is not indicated by the characters ordinarily used for that purpose: *Coffe v. Hendricks*, 66 Tex. 676. It is not necessary to enable the record copy of a deed to be received in evidence that anything should appear in the copy to represent the seal required to accompany the certificate of acknowledgment: *Witt v. Harlan*, 66 Tex. 660.

deed, we are of course in the dark as to just what the original deed did express on its face. It may have had merely a scrawl; it may have had a regularly cut, engraved, or stamped seal of the notary public; but be that as it may, I do not think you are to stand by the seal alone. I think you must have also the certificate of the officer that what purports to be his seal is his official seal. Inasmuch as this deed is wholly barren of any statement of this kind, and fails to show affirmatively that the seal affixed to the instrument is his notarial or official seal, I think it was erroneously received in evidence by the court.”¹

§ 493. **Comments.**—It is true that the law relating to acknowledgments is purely statutory, and it may be said that the certificate should show that every requirement of the statute has been fully and strictly complied with. But we believe that a reasonable construction should be given to statutes upon this subject, and that officers empowered to take acknowledgments should not be held to a greater degree of responsibility than officers authorized to perform other official acts. Nor should an acknowledgment, where there has been a substantial observance of the provision of the statute, be invalidated, in our opinion, on account of some slight informality of expression. It certainly seems just and reasonable to say that a certificate of acknowledgment is under the official seal of the officer who took the acknowledgment, without an express declaration to that effect, if the seal is in fact attached to the certificate.

§ 494. **Use of a private seal.**—The general rule is that a notary public or other officer required to have a seal cannot authenticate his official acts, to which it is necessary to attach his seal of office, by using his private seal. But it is sometimes provided by statute that the acknowledgment of a notary, taken under his private seal, is valid, if it is stated in the acknowledgment that the

¹ Wetmore v. Laird, 5 Biss. 160, 161.

notary has not obtained an official seal.¹ But, in the absence of such a statute, the general rule on this subject is correctly stated by Chief Justice Treat: "A notary is empowered to take the acknowledgment of a deed, and certify the same under his official seal. He has no power to do it in any other manner. If he has no notarial seal with which to authenticate his official acts, he is destitute of any authority to certify the acknowledgment of a deed. He must procure an official seal before the authority conferred on him to take the acknowledgment of deeds attaches. He cannot make use of a scrawl or private seal for the purpose of authenticating a certificate of acknowledgment. The provision of law allowing certain officers to use their private seals until they should be provided with public seals had no application to a notary. He has to provide himself with an official seal. It is not furnished him by the public."²

§ 495. What will constitute an official seal.—The form of the officer's seal is generally prescribed by statute. In such case a substantial compliance with the statute, of course, is necessary. But in the absence of statutory regulation, the notary may adopt any seal descriptive of his office and designating the locality within which he exercises his functions.³ Mr. Bump, in his treatise on Bankruptcy, on the authority of the case cited in the above note, says: "The requisites of a notarial seal are determined by the law of the locality from which he derives his authority. In the absence of legislation, an official seal need not contain the name of the official whose seal it purports to be. An impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal, is entitled to judicial sanction as evidence of the official character of the individual who

¹ *Fogarty v. Sawyer*, 23 Cal. 570. See *Ingoldsby v. Juan*, 12 Cal. 564; *Geary v. Kansas City*, 61 Mo. 378.

² In *Mason v. Brock*, 12 Ill. 273, 276; 52 Am. Dec. 490. But see *Collins v. Boyd*, 5 Dana, 316.

³ In *re Phillips*, 14 Nat. Bank. Reg. 219.

signs the jurat, and the presumption is that the seal is his official seal.”¹ To adopt the language of a learned judge: “He may adopt a seal with such an inscription as his judgment may dictate, or his fancy may suggest. It must, however, be capable of making a definite and uniform impression on the paper on which a certificate is written, or on some tenacious substance attached thereto, so that when a question arises as to the genuineness of an authentication, it may be determined by reference to the seal of the officer.”²

¹ Bump on Law and Prac., Bank’y (10th ed.) 86.

² Chief Justice Treat, in *Mason v. Brock*, 12 Ill. 273, 276; 52 Am. Dec. 490. But in the case of *In re Nebe*, 11 Nat. Bank. Reg. 289, where it was held concerning a deposition that it must appear from the impression of the seal that it is the seal of the notary who employs it to authenticate his acts, it is said by the register: “The statute requires the act of the notary to be authenticated by his *signature* and his *official seal*. There is nothing from which it can be inferred that one of these is of less importance than the other, and therefore an authentication by either would be imperfect without the other. But what is an ‘official seal’? A seal at common law was an impression upon wax. By statute in this State, and by statute or usage in many others, a scroll made with a pen will serve the purpose of a private seal. But this, so far as I know, has never been extended to corporate or official seals. As regards these, it has required no little litigation to settle the question that an impression on wax is unnecessary; but all the cases held that an impression on paper is indispensable. But an impression of what? Public seals—and a notary’s seal is a public seal—are held to prove themselves. Is any stamp which a notary chooses to affix to his signature entitled to recognition as his official seal? Such a construction strikes me as a burlesque upon the provisions of the act of Congress, which makes both signature and seal necessary to the authentication of the notary’s act. And if as a public seal it proves itself, must it not show on its face what it is that it proves; not only that it is a seal, but that it is the seal of a notary public; and in order to show that it is the seal of the notary who employs it that it must bear his name? If it be admitted that the seal in this case is the seal of a notary public, it is just as clearly the seal of every other of the notaries public, in number about one thousand, who hold office in the county of Wayne; and what, then, becomes of the provisions of the law which require the notary’s act to be attested by ‘his official seal’? In the case of *Gage v. Dubuque and Pacific Railroad Co.*, 11 Iowa, 314, [310], 77 Am. Dec. 145, the court holds ‘that unless the name of a notary public, and the State in which he acts, are engraved upon his seal so that an impression can be made therefrom, his seal would not be received as evidence.’ This was held to render invalid a seal where a part only of it was written, and not impressed upon the paper. The court says in

§ 495 a. **Officer using another's seal.**—While a notary must attach a seal when required by the statute, he may use the seal of another officer, and although the latter may differ somewhat from his own, its use will not affect the validity of the instrument, nor render its recording imperfect. The Supreme Court of Indiana have had occasion to examine this question, and while it may be admitted that the views expressed by the court were not, in the extreme sense of the term, necessary to the decision, because they said if wrong a reversal for other reasons would not result, still we believe the court correctly stated the law. A seal was actually impressed upon the paper, and the certificate, for aught that appeared on its face, was complete in form and authentication. The notary in fact took the acknowledgment, executed and signed the proper certificate, and affixed a seal to the certificate, and the only defect, therefore, that could exist in the acknowledgment, was that the officer used another's seal. On this point, Mr. Justice Elliott, speaking for the court, observed: "No one can perceive how this branch of duty could have worked injury to any person in the world. Whether the one seal or the other was used did not add to or take from the certificate any real efficacy. If the notary, two hours before the acknowledgment, had thrown away his old seal and adopted another, certainly no real harm to any person could have been done. Nor is it easy to see how the mere use of one seal instead of another, where both are mere general seals without any peculiar marks or names, could do any body any harm."¹ But the use by a notary

addition: 'If a portion of the words necessary to be used in the body of the seal may be written, the whole may be.' I do not see how this rule can be departed from without introducing a laxity in practice which will defeat entirely the object contemplated by the statute, which requires the notary's act to be authenticated 'by his official seal.'" The conclusions of the register were approved by Longyear, J. To the effect that an acknowledgment of a deed taken by a notary public, but the certificate of which is not signed by him, is insufficient to make the record evidence of the execution: See *Clark v. Wilson*, 27 Ill. App. 610. Affirmed in 127 Ill. 449; 11 Am. St. Rep. 143.

¹ *The Muncie Nat. Bank v. Brown*, 112 Ind. 474, 477.

of the seal of a county court, though done by mistake, will vitiate the act.¹ The distinction consists in the fact that the officer used the seal of a separate and entirely distinct office. Nor must the rule announced be confused with the case where the officer states that the acknowledgment was taken in a specified county before a notary public of that county, who certifies that he attached to it his notarial seal, and the only seal that is attached to the certificate of acknowledgment is his seal as a notary public of another county. This is equivalent to using no seal at all, and in such a case the certificate of acknowledgment is so defective that the record of the deed is not constructive notice to a subsequent purchaser.²

§ 496. Signature of officer must be attached to certificate.—To make the certificate of acknowledgment complete, the officer must sign it. Writing his name in the body of the certificate is not such a signature as the law demands. In a case where this principle was announced, it was contended that a certificate is lawfully signed, if the name is inserted in it by the officer, without any technical subscribing, on the same principle which regards a signing good under the statute of frauds without an actual subscription. The court observed that the practice was common among conveyancers to insert the name as well as the title of the acknowledging officer in the body of the certificate beforehand, so that nothing remained for the officer to do but to attach his signature; and justly remarked that there could be no security against additions to the certificate, if the officer's name were placed at the head only, and as the records were *prima facie* evidence, and the original could not always be obtained, fraud could be practiced with comparative immunity.³ "Giving a mere recital of the name of the

¹ McKellar v. Peck, 39 Tex. 381.

² Emeric v. Alvarado, 90 Cal. 444.

³ Marston v. Bradshaw, 18 Mich. 81; 100 Am. Dec. 152. But see Wright v. Wilson, 17 Mich. 192, where of two separate certificates of husband and wife only one was signed, it was held sufficient. See § 485,

officer and style of office in the body of the certificate, though written by him, the force of an official signature, would tend to render titles insecure, and induce litigation, which it is the purpose of the statutes to prevent.”¹

§ 497. **Certificate of foreign officer is prima facie evidence of conformity to law.**—The validity of the certificate of an officer of the state, before a court of which it is questioned, is a matter of law. But the conformity of a certificate of a foreign officer to the foreign law is a question of fact to be established by evidence. But where the certificate of such foreign officer is made, the certificate itself is *prima facie* evidence of its conformity to law. Hence, in Mississippi, under a statute of that state which declared that “where the parties or witnesses to a deed resides in a foreign kingdom, state, nation, or colony, the acknowledgment or proof made before any court of law, or mayor, etc., certified by the said court, mayor, etc., in the manner such acts are usually authenticated by them, or him, shall be sufficient,” it was held that an acknowledgment taken before the mayor of Liverpool, purporting to be under his official signature, and bearing the corporate seal, but which was signed, not by him, but by the town clerk, was valid; the presumption is that this was the usual mode of authenticating the official acts of the mayor.²

ante. And see, also, *Watson v. Clendinin*, 6 Blackf. 477; *Duncan v. Duncan*, 1 Watts, 322.

¹ *Carlisle v. Carlisle*, 78 Ala. 542, 545, per Clopton, J. See, also, *Jefferson County Building Assn. v. Heil*, 78 Ala. 513; *Clark v. Wilson*, 127 Ill. 449; 11 Am. St. Rep. 143. If, however, a foreign notary does not sign his christian name, but his initials only, but in the copy of his notarial commission, and in the certificate attached to it, his christian name is given, the discrepancy is not sufficient to justify the rejection of the deed as evidence: *Denny v. Ashley*, 12 Col. 165.

² *Sessions v. Reynolds*, 7 Smedes & M. (15 Miss.) 130. It is immaterial, under a statute providing for the appointment of commissioners of deeds resident in other States whether or not the person whose acknowledgment is taken by such commissioner is domiciled in the State where the acknowledgment is taken: *Buggy Co. v. Pregram*, 102 N. C. 540. If a statute provides that where an acknowledgment is taken in another

§ 498. **Taking an acknowledgment is a ministerial act.**—The current of authority is to the effect that the taking of an acknowledgment is an act purely ministerial in its character, and not in any sense judicial. "It involves no compulsion or summons of any person who does not appear of his own accord, and rarely, if ever, requires an investigation of the circumstances under which the deed was executed."¹ On the ground that an officer in taking an acknowledgment acts ministerially, it is held that it is not sufficient for him to certify that the acknowledgment was taken *according to law*, but he should state what was done, showing a compliance with the statute.² "The clerk," said the court, "is a ministerial, and not a judicial officer, and whether the *feme* relinquished her title in the way the law required, it was not his duty or province to decide. It was his duty to state the facts in regard to her acts and declarations, and whether they amounted to a compliance with the legal requisitions, and were sufficient to pass her title, it would devolve upon the

State, the clerk certifying to the official character of the officer shall also state that the deed was "executed and acknowledged according to the laws of such State," a certificate to that effect by the clerk settles any question as to the form of the acknowledgment: *Culbertson v. Whitbeck*, 127 U. S. 326.

¹ *Learned v. Riley*, 14 Allen, 109, 113, per Justice Gray; *Odiorne v. Mason*, 9 N. H. 24; *Lynch v. Livingston*, 6 N. Y. 422; *Hill v. Bacon*, 43 Ill. 477; *Biscoe v. Byrd*, 15 Ark. (Barber) 655; *Schultz v. Moore*, 1 McLean, 520; *Williamson v. Carskadden*, 36 Ohio St. 664; *People v. Bartels*, 138 Ill. 322; *Doran v. Butler*, 74 Mich. 643; *Curtiss v. Colby*, 39 Mich. 456; *Halso v. Seawright*, 65 Ala. 431. See *Kimball v. Johnson*, 14 Wis. 674. In *Biscoe v. Byrd*, 15 Ark. (Barber) 655, 659, it is said concerning the power of taking an acknowledgment: "It is, in its nature, an act of personal trust, and is conferred on several officers, some of whom have no judicial power, in consequence of their improved capacity and integrity. It belongs to that class of duties known and recognized by this and other courts as strictly ministerial. Thus, it has been held that taking a recognition is a ministerial act: *Albee v. Ward*, 8 Mass. 84; *Levy v. English*, 4 Ark. 65. Taking an affidavit is such: 4 Bos. & P. 37. And so, also, is the taking of an acknowledgment of a deed: *Gill v. Fauntleroy*, 8 Mon. B. 177; *Beaumont v. Yateman*, 8 Humph. 543; *Hopkins v. Menderbak*, 5 Johns. 234; *Moore v. Vance*, 1 Ham. 1; *Kinsman v. Loomis*, 11 Ohio, 479."

² *Gill v. Fauntleroy's Heirs*, 8 Mon. B. 177.

judge or court to decide.”¹ There are, however, some cases in which it is intimated that an officer, in taking an acknowledgment, performs duties of a judicial nature. But these, we believe, will be found on examination to have been decided on other points, and though the observation may have been made that the act was a judicial one, yet the decision of the court did not result as a conclusion from the assumption that such was the case.²

¹ Gill v. Fauntleroy's Heirs, *supra*.

² Thus, in Wasson v. Connor, 54 Miss. 351, the point decided by the court was that a chancery clerk, who is the *cestui que trust* in a deed of trust, cannot take the acknowledgment of the deed. But in the course of its opinion the court said: “Whatever may be said of the receiving for record and recording of a deed, it is evident that the taking of acknowledgment of a grantor is a *quasi* judicial act, and cannot be performed by the grantee in the deed. The officer who takes an acknowledgment acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be, the grantor named in the conveyance, actually is the grantor. He determines further whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument. By his certificate he makes an official record of his adjudication on these points, which cannot be impeached by himself, and sometimes cannot be impeached by the grantor: Johnston v. Wallace, 53 Miss. 331; 24 Am. Rep. 699. Inasmuch as no man can be a judge in his own case, it follows that the grantee in a deed can never act as an officer in taking an acknowledgment to the conveyance: Beaman v. Whitney, 20 Me. 413; Groesbeck v. Seeley, 13 Mich. 329; Goodhue v. Berrien, 2 Sand. Ch. 630.”

And so in Jamison v. Jamison, 3 Whart. 457, 31 Am. Dec. 536, the point decided by the court was that parol evidence was inadmissible to show what passed at the time of the acknowledgment of a deed by a married woman for the purpose of contradicting the certificate, except in cases of fraud and imposition. The court, however, said: “The judge or justice of the peace, in taking an acknowledgment, acts judicially, not ministerially. The law imposes on him the duty of ascertaining by his own view and examination the truth of the matters to which he is to certify, and points out precisely his duty. Having thus intrusted him to see that the proper forms are observed, his solemn certificate that they have been observed, on the faith of which parties act, contracts are proceeded in, moneys are paid, and deeds accepted, must (in the absence of fraud or collusion) be considered as entitled to full faith and credit; and cannot, without rendering titles to real estate exceedingly insecure, be left at any distance of time afterward to the uncertainty and frailty of proof, and to all the mistakes, prejudices, imperfections, and hazards that attend it.” See, also, Hornbeck v. Building Assn., 83 Pa. St. 64; Griffith v. Ventress, 91 Ala. 366; 24 Am. St. Rep. 918.

§ 499. **Official character of officer should appear.**—The general rule is that it should appear from the certificate that the person who took the acknowledgment was an officer authorized by law to do so. Thus, a copy of a deed was offered in evidence in the certificate of acknowledgment, of which it was not expressed that the person taking it was an officer of any kind, and the name subscribed had no addition of any official character. The plaintiff offered to prove by other evidence that the person who took the acknowledgment was a duly qualified officer. The deed and proof were both rejected. The supreme court sustained the ruling, and observed: "The acknowledgment or proof is nothing unless it be taken by an authorized officer, and, whether the person be authorized or not, is a fact which ought to appear in the certificate of the officer himself. This, *prima facie*, would be sufficient to authorize the record, and to throw the proof on the person impeaching the deed. In this case nothing of the kind appears in the certificate, or attached to the subscription, consequently the deed was not duly recorded, and the copy cannot be received as evidence."¹ If, in the body of the certificate, the officer's official character is properly described, it is unnecessary to add the title of his office to his name.²

¹ Lessee of Johnston v. Haines, 2 Ohio, 55; 15 Am. Dec. 533. The court, however, confines the exclusion of proof to the case of the copy of the deed offered in evidence, saying: "Proof distinct from the certificate upon which the record was made, that the person who took the acknowledgment was in fact a justice duly qualified, could not be received at the trial, because it was a copy, and not the original, to which the evidence was intended to be applied. We do not decide what would be the law had the original deed been in court, and proof offered that the person who took the acknowledgment was a justice. We think it clear that, in the case of a copy, such proof cannot be received. The record being irregular, the original is not proved, and, until that is done, a copy cannot be used": And see, also, Cassell v. Cooke, 8 Serg. & R. 268; 11 Am. Dec. 610; Lincoln v. Thompson, 75 Mo. 613; Myers v. Boyd, 96 Pa. St. 427.

² Brown v. Farran, 3 Ohio, 140; Lake Erie etc. R. R. Co. v. Whitham, 155 Ill. 514; 46 Am. St. Rep. 355. If the title of the officer stated in the body of the certificate of acknowledgment is that of one not authorized

§ 500. **Certificate prima facie evidence.**—But if the officer describes himself as an officer, on whom the law confers authority to take acknowledgments, he is not required to state in his certificate that he is so authorized.¹ If the person taking an acknowledgment styles himself an officer before whom an acknowledgment may be taken, his certificate is *prima facie* evidence of the fact that he is such officer.² And where a certificate purporting to have been made in a particular county, states that the officer is “an acting justice of the peace,” without designating of what county, his official character is sufficiently shown.³ But it was held in Illinois that a deed to land in that State, executed and acknowledged in another State, was not admissible in evidence for the reason that the certificate of the judge in the latter State did not show that the justice taking the acknowledgment was such at the time the acknowledgment was taken, but stated only in general

to take the acknowledgment, and the suffix to the signature, read in connection with the deed, shows an officer having such authority, the suffix will control: *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106.

¹ *Lessee of Livingston v. McDonald*, 9 Ohio, 168. In *Sparrow v. Hovey*, 41 Mich. 708, the certificate of acknowledgment was headed: “The State of New York, New York County, ss.,” and signed Edwin F. Corey, Com. for the State of Michigan, in New York. The officer described himself in the body of the certificate as “a commissioner for the State of Michigan, within and for said county.” The official seal consisted of a red wafer impressed with the words Edwin , Commissioner of Deeds for Michigan. There was no recital in the certificate that the officer was appointed and commissioned by the governor. The court held that the deed to which the certificate was attached was sufficient to entitle the deed to admission in evidence, and said: “Objection was made that the full name of the commissioner did not appear in the impression made on the official seal, the first name, Edwin, only appearing. There is nothing in this that should cause any doubt whatever to be thrown upon the matter. It very frequently happens that a clear and distinct impression in full does not appear, but this has not generally been considered as throwing any doubt upon the genuineness of the official act. It was not necessary for the commissioner in the body of the certificate to recite the source of his power, or that he had duly qualified, any more than it would be for a notary or justice of the peace.”

² *Tuten v. Gazan*, 18 Fla. 751.

³ *Livingston v. Kettelle*, 1 Gilm. 116; 41 Am. Dec. 166.

language the fact that he was a justice.¹ Mr. Justice Cowen said that if the certificate was not to be taken as presumptive evidence of the facts recited, the objections that might be made to a certificate would, if allowed, "destroy almost entirely the utility of the statutes, which declare a probate or certificate of acknowledgment indorsed by certain officers upon a deed, to be *prima facie* evidence of its execution. If their official character, their signatures, and that they acted within their territorial jurisdiction, must be shown by extrinsic evidence, the party may as well, and in general, perhaps, with more convenience to himself, procure the common-law proof. The practice is to take a certificate which appears on its face to be in conformity with the statutes, as proof of its own genuineness. It need only be produced. There is no need of extrinsic proof, such as showing by whom it was made, any more than of a notary's certificate when received under the commercial or civil law, or a clerk's certified rule of the court in which the cause is pending. Accordingly, where the certificate describes the proper officer, acting in the proper place, it is taken as proof both of his character and local jurisdiction. He is like an officer authorized to take testimony *de bene esse* under various statutes."²

§ 501. Abbreviations are sufficient designation of official character.—An abbreviation of the official name of the officer taking the acknowledgment is sufficient. Thus, the letters "J. P." sufficiently indicate that the officer to whose name they are attached is a justice of the peace. The statute of Mississippi provided that an acknowledgment might be made before certain officers, and that "a certificate thereof must be written on or under the deed or conveyance, and signed by the officer before

¹ Phillips v. People, 11 Ill. App. 340.

² Thurman v. Cameron, 24 Wend. 87, 92. See, also, Thompson v. Morgan, 6 Minn. 220; Hassler v. King, 9 Gratt. 115; Belo v. Mayer, 79 Mo. 67; Evans v. Lee, 11 Nev. 194; Tuten v. Gazan, 18 Fla. 751; Bell v. Fry, 5 Dana, 341; Harding v. Curtis, 45 Ill. 252.

whom it was made." A justice of the peace in taking an acknowledgment appended to his signature the letters "J. P." The court said: "It is not provided that the certificate shall contain a description of the office of the person taking the acknowledgment, nor is any mode of showing his official character prescribed. It may, therefore, be shown either in the body of the certificate, or by additions and prescriptions attached to his signature. If it appear by the latter mode, it is sufficient if it be done in such manner as to render the description of the officer plain and easily intelligible, and abbreviations may be used, if, in general understanding, their import be known and fixed.¹ The abbreviations here used are in very general use, and it may be safely said that there are few persons capable of reading and writing, who did not understand the letters 'J. P.' to signify justice of the peace."² So, where the only description of the official character of the person who took an acknowledgment of a deed in another State was supplied by the letters "J. P." appended to his name, it was held that the certificate prescribed by statute as to the execution of deeds in other States, containing an attestation of the official character of the acknowledging officer as a justice of the peace, was sufficient to show that he was such officer.³ The letters "N. P." are sufficient to show that the officer, opposite to whose name they are written, is a notary public.⁴

§ 502. **Proof aliunde of official character.**—Where it is not required by statute that the certificate of the acknowledging officer shall show that he is an officer authorized by law to take acknowledgments, the fact may be proved *aliunde*.⁵ In the Supreme Court of the United

¹ Citing *Duval v. Covenhoven*, 4 Wend. 561.

² *Russ v. Wingate*, 30 Miss. 440.

³ *Final v. Backus*, 18 Mich. 218.

⁴ *Rawley v. Berrian*, 12 Ill. 198, 200. In *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106, this section is cited as authority, and many important cases are collated.

⁵ *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 508; *Bennett v. Paine*, 7 Watts, 334; 32 Am. Dec. 765; *Shults v. Moore*, 1 McLean, 520;

States, where the certificate of acknowledgment did not contain an official designation of the officer who took the acknowledgment, it was decided that under the Maryland statute, this fact might be shown by parol evidence. Mr. Chief Justice Taney said: "We perceive nothing in the Maryland acts of assembly which requires justices of the peace or other officers to describe in their certificates their official characters. It is no doubt usual and proper to do so, because the statement in the certificate is *prima facie* evidence of the fact, where the instrument has been received and recorded by the proper authority. But such a statement is not made necessary by the Maryland statutes. And whenever it is established by proof that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity, and when their official characters are sufficiently shown by parol evidence, or by the admissions of the parties, we see no reason for requiring more where the acts of the legislature have not prescribed it. On the contrary, the soundest principles of justice and policy would seem to demand that every reasonable intendment should be made to support the titles of the *bona fide* purchasers of real property; and this court is not disposed to impair their safety by insisting upon matters of form, unless they were evidently required by legislative authority."¹

Van Ness v. Bank of United States, 13 Peters, 17. And see Rhodes v. Selin, 4 Wash. C. C. 718; Jeffreys v. Collis, 4 Dana, 470; Byer v. Etnyre, 2 Gill, 150; 41 Am. Dec. 410.

¹ Van Ness v. The Bank of the United States, 13 Peters, 17, 21. In Bennett v. Paine, 7 Watts, 334, 32 Am. Dec. 765, a certificate of acknowledgment contained no declaration of the official character of the person who took it. A copy of the commission of the officer taken from the records of his county, and certified to by the recorder that it was a true copy, was offered to supply the defect. Upon this point the court say: "The certificate of acknowledgment, certainly contains no assertion of magisterial character. It is not affirmative of either office or place; but may not proof of these, as in the Commissioners v. Ross, 3 Binn. 539; [5 Am. Dec. 383] be supplied *aliunde*? In that case a deposition, in the caption of which it was neither stated nor apparent that the examiner was a justice for the county, was received on the authenti-

§ 503. **Stating the name of the grantor in the certificate.**—The name of the party acknowledging the deed should always appear in the certificate. And in some cases the omission to do so has been held to vitiate the acknowledgment.¹ A certificate omitting the name of

cation of the fact by the prothonotary's certificate; and in what does it differ from the present? In nothing, perhaps, but that the identity of the person was more distinctly disclosed; and that the supplemental certificate was given by the prothonotary instead of the recorder. The evidence that the act was done within the jurisdiction of him who is thus proved to have been a magistrate, is equal, if not greater, in the present, for we have the exemplification of a commission to a person of the same name who was commissioner for the county in which the grantors reside. In *Dunn v. The Commonwealth*, 14 Serg. & R. 432, the exemplification of a sheriff's bond, required by statute to be taken before the recorder of deeds, was rejected, though the name of the subscribing witness was identical with that of the recorder, because it was thought that the statutory proof of execution, which was the fact directly in issue, ought to be as entire as the common-law proof intended to be superseded by it. Here there is no substitution of statutory for common-law proof, and the question of law is collateral. Is it too much, in the absence of counterproof, to presume that the person named in the commission is he who received the acknowledgment? It may have possibly been certified by another of the same name, there or elsewhere; but so might it be if it did contain an affirmation of character and place. The proof to sustain the certificate in that case and this, is the presumption which the law makes in favor of legality."

¹ *Hiss v. McCabe*, 45 Md. 84; *Smith v. Hunt*, 13 Ohio, 260; 42 Am. Dec. 201; *Hayden v. Westcott*, 11 Conn. 129. In *Hiss v. McCabe*, *supra*, Bartol, C. J., delivering the opinion of the court, said: "Jacob Murray, one of the parties' grantors, is described in the deed as the heir at law and next of kin of said Alexander Murray and Victorine Collins as the adopted daughter of said Alexander, who is mentioned in his will as Victorine Murray. This deed is produced for the purpose of showing that the title to the nine inches of ground not embraced in the lease, which it is alleged has been acquired by Alexander Murray in fee by adversary and exclusive possession, has been thereby vested in the appellee. But it is ineffectual for that purpose, the same not having been acknowledged according to law. The acknowledgment purports to have been made by — Murray, without other designation of the person making the acknowledgment, which is insufficient to convey the title of Jacob Murray, even if it were satisfactorily proved that he was the heir at law of Alexander Murray, deceased." See, also, *Lincoln v. Thompson*, 75 Mo. 613; *Wilcoxon v. Osborn*, 77 Mo. 621; *Magness v. Arnold*, 31 Ark. 103. But one christian name is recognized: *Schofield v. Jennings*, 68 Ind. 232; *James v. Stiles*, 14 Pet. 322; *Page v. Arnim*, 29 Tex. 53.

the grantor, was held not to import an acknowledgment by him. Bissell, J., speaking for the majority of the court, said: "It has been said again, that the certificate is the language of the magistrate; and that its fair import is that the person by whom the deed is executed, appeared and acknowledged it. If this be so, the deed is undoubtedly well acknowledged. But are not the terms of the acknowledgment always the language of the person making it? And does the certificate of the magistrate import anything more than it was made before him, and in his presence? And is it the fair import of this certificate that the grantor appeared and made the acknowledgment? The certificate is, to say the least of it, equivocal; and every word of it would be satisfied, provided some person other than the grantor, appeared before the magistrate and acknowledged the instrument. How, then, can we say that the requirements of the statute have been complied with; and that this deed has been duly acknowledged by the grantor? If we were permitted to look away from the certificate and to speculate upon probabilities, we might, and undoubtedly should, come to the conclusion that the deed was acknowledged by the grantor; because it is highly improbable that any other person should have appeared and made the acknowledgment. . . . But we may not thus speculate. We can only give a construction to the certificate; and upon this a majority of the court are of the opinion that the deed is not duly acknowledged, and that it was properly rejected in the circuit."¹ A similar decision

¹ *Hayden v. Westcott*, 11 Conn. 129. The acknowledgment was in these words: "Personally appeared — —, and acknowledged this instrument by him sealed and subscribed, to be his free act and deed." Church, J., dissented and said: "In the construction of deeds and other writings, if the court can discover the meaning intended to be conveyed, with such a degree of moral certainty as to leave no reasonable doubt of such meaning, the intention so expressed, if consistent with the rules of law and the purposes of the parties, should be supported. When I look over this deed in connection with the certificate of the magistrate, I think I see with all this certainty, that it has been acknowledged according to law. I have no doubt but the evidence of an acknowledg-

was made in Ohio, where the certificate of acknowledgment was held void for the omission of the name of the mortgagor, the court remarking: "If Folsom is blank, and blank is Folsom, the execution of the mortgage is complete, but as no evidence is adduced to prove these facts, we know of no rule of law which will authorize us to infer that Ezekiel Folsom, the grantor, is just nobody at all."¹

ment of a deed should appear upon the deed and be in writing. The certificate or evidence of acknowledgment is a part of the deed, and is to be construed in reference thereto. To the deed in question the signature and seal of Knight Whittemore, the grantor, are affixed by *himself*; and immediately follows the official certificate of the magistrate of the acknowledgment. In this certificate, the magistrate alone is speaking; and he certifies to the truth of several facts: *First*, that some one appeared before him in person, for he says 'personally appeared'; *secondly*, that the person acknowledged the deed to be his free act, 'and acknowledged this instrument,' etc.; *thirdly*, that the person thus appearing and acknowledging the deed was in fact the grantor, Knight Whittemore, 'by him sealed and subscribed,' etc. It is not doubted that a certificate averring the grantor of the deed appeared and acknowledged it, without giving his name, would be sufficient. It appears to me that the present certificate is equivalent to such a one. To give to this certificate this construction, it is not, in my opinion, necessary to supply any words which may be supposed to have been omitted; but if it was, then the words 'which was' inserted next after the word 'instrument' would give to the certificate certainty to a common intent at least. And that words may be supplied to effect a construction manifestly in support of intention is well settled: *Booth v. Wallace*, 2 Root, 247; *Couch v. Gorham*, 1 Conn. 36; *Bigelow v. Benedict et al.*, 6 Conn. 116; *Peck v. Wallace*, 9 Conn. 453; *Wright v. Dickinson*, 1 Dow, 141, 147; 1 Chitty Gen. Prac. 124. But if the language used is capable of two constructions, which in the present case I am bound to concede, I adopt that which is consistent with, and will support the validity, of the deed."

¹ *Smith's Lessee v. Hunt*, 13 Ohio, 260, 209; 42 Am. Dec. 201. But see *Wilcoxon v. Osborn*, 77 Mo. 621. A deed purporting to be signed by Geo. H. Case, in the certificate of acknowledgment of which the notary certifies that Geo. H. Crane was known to him to be the signer and sealer of such deed, is not competent, without further proof, to establish a conveyance by Geo. H. Case: *Heil v. Redden*, 38 Kan. 255. A certificate without explanation that James B. acknowledged the execution of a deed signed by and purporting to be the act of Jonas B. will not, it is held, entitle it to record: *Stephens v. Motte*, 81 Tex. 115. If a deed is signed F. W. Chandler and appears to have been acknowledged by T. W. Chandler, the acknowledgment is insufficient: *Carleton v. Lombardi*, 81 Tex. 355. But see *Cheek v. Herndon*, 82 Tex. 146.

§ 504. **Certificate sufficient if it shows the grantor's name by reference.**—The certificate of acknowledgment, however, will be sufficient, even if the name of the grantor be defectively stated or entirely omitted, if it appear, with reasonable certainty, that the instrument was in fact acknowledged by the grantor. Thus, in a deed, one of the grantors was designated as Richard G. Bailey, and it was signed R. G. Bailey. The certificate of acknowledgment, after a designation of the State, county, and town, proceeded, "this thirty-first day of January, A. D. 1842, Oliver Hale and Daniel Brown, Richard G. personally appeared and acknowledged this instrument by them *sealed and subscribed* to be their free act and deed," etc. The court was of the opinion that though the surname was omitted, yet the statement that Richard G., who executed the instrument, acknowledged it, made it sufficiently certain that it was acknowledged by the grantor.¹ So where the certificate of acknowledgment omitted the name of the grantor, but described him as "the signer and sealer of the foregoing instrument," the certificate was held sufficient.² And a certificate which shows that the person

¹ *Chandler v. Spear*, 22 Vt. 388. And see *Wilcoxson v. Osborn*, 77 Mo. 621; *Owen v. Baker*, 101 Mo. 407; 20 Am. St. Rep. 618; 14 S. W. Rep. 175; *Hughes v. Morris*, 110 Mo. 306; 19 S. W. Rep. 481; *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106; *Cleland v. Long*, 34 Fla. 353; *Logan v. Williams*, 76 Ill. 175; *Chase v. Whiting*, 30 Wis. 544; *Hiles v. La Flesh*, 59 Wis. 465; 18 N. W. Rep. 435; *Brunswick etc. Co. v. Brackett*, 37 Minn. 58; 33 N. W. Rep. 214; *Wells v. Atkinson*, 24 Minn. 161; *Robidoux v. Casilegi*, 10 Mo. App. 516; *Chandler v. Spear*, 22 Vt. 388; *Brooks v. Chaplin*, 3 Vt. 281; 23 Am. Dec. 209; *Sharpe v. Orme*, 61 Ala. 263; *Kelly v. Rosenstock*, 45 Md. 389; *Frostburg Mut. Building Assn. v. Brace*, 51 Md. 508; *McClure v. McClurg*, 53 Mo. 173; *Kelly v. Calhoun*, 95 U. S. 710; *Basshor v. Stewart*, 54 Md. 376.

² *Sanford v. Bulkley*, 30 Conn. 344. The opinion of the court was delivered by Butler, J., who in the course of it said: "The statute requires that every deed of houses and lands shall be acknowledged by the grantor to be his free act and deed before one of certain specified officers, and the construction given it by this court requires that the officer should make a certificate in writing on the deed, to be recorded with it, that such acknowledgment has been made before him. No particular form of certificate is necessary. It is sufficient if the fair import of it is that the grantor appeared in person before the officer and acknowledged that

who made the acknowledgment is the grantor, even if it omits his name, is sufficient if it refers to him by name in the wife's acknowledgment.¹

§ 505. **Presumption that parties use their real names.** The presumption of law naturally is that a person uses

the instrument was his free act and deed. A concise and perfect form has long been in general use. Omissions in that form have brought questions respecting the sufficiency of the certificate several times before the court. Thus, in *Stanton v. Button*, 2 Conn. 527, there was an omission of the word 'acknowledged,' and the court properly held that the certificate did not import that the grantor had acknowledged the deed, and that it was fatally defective. In *Hayden v. Westcott*, 11 Conn. 129, the name of the person who appeared was omitted, and the certificate varied somewhat from the usual form. There the words were: 'Personally appeared — —, and acknowledged this instrument by him sealed and subscribed to be his free act and deed.' A majority of the court were of opinion that the certificate did not fairly import that the grantor appeared, for that although the words 'by him sealed and subscribed' referred to the grantor, they did not, with certainty to a common intent, refer to the person who appeared to make the acknowledgment. In this case the language is: 'Personally appeared — —, signer and sealer of the foregoing instrument,' etc. If it was: 'Personally appeared — —, grantor in the foregoing instrument,' it would clearly be sufficient. But the grantor signs and seals an instrument, and the witnesses 'subscribe' or 'attest' it. The words 'signer and sealer,' therefore, used in the same connection, fairly import that the 'grantor' appeared and made the acknowledgment. It is claimed that the certificate should show that the person who acknowledged was the veritable grantor, *known to the magistrate as such*. A certificate expressly asserting actual knowledge of the identity of the person by the officer is required in some States, but never has been in this, the ordinary presumption that the magistrate had acted rightly having been deemed sufficient. And in this case, if the name of the grantor had been inserted in the blank, the certificate would not for that reason show that the *veritable grantor* appeared and acknowledged the deed, without the aid of that presumption, for there may be many of the same name, or the name may have been inserted by the draughtsman, and not by the magistrate, and the deed carried and acknowledged before him by another person of the same name. It is not, indeed, in any case the mere presence of the name of the grantor in the blank of the common certificate which furnishes satisfactory evidence that the grantor acknowledged the deed, but the addition of the words 'signer and sealer of the foregoing instrument,' which distinguish him from those of the same name, in conjunction with the presumption that the magistrate was acting rightly, and certifying only to that of which he had actual knowledge."

¹ *Magness v. Arnold*, 31 Ark. 103.

his real name. And although it may be true, as matter of fact, yet it is not a legal presumption that he is known by different names. On this ground a deed which purported to have been made by *Hiram* Sherman, but was signed *Harmon* Sherman, although it appeared to have been acknowledged by Hiram Sherman, was held so defective in acknowledgment as not to be admissible on the acknowledgment alone, in evidence. The ground upon which the court based its decision is found in this language: "In the absence of proof, a deed signed by *Harmon*, and acknowledged by *Hiram*, is signed and acknowledged by different persons. There is nothing in the certificate of acknowledgment which can supply the defect, if it could be supplied in that way, upon which there is no occasion to express an opinion. *Hiram* Sherman, in legal presumption, has executed no deed which he could acknowledge. A person may be known by an *alias* as well as by his real name, may use a name for a single occasion which he would be *estopped* to deny. But this could only be shown by directly connecting him, by proof, with the execution and delivery of the deed, and in such a case he would not be bound because he had acquired a new name in fact, but only because he had so acted that in the given case he could not be heard to dispute his own act. If there had been proof in this case that Hiram Sherman was known also by the name of Harmon Sherman, we are not prepared to say it would not have laid a foundation for introducing the record."¹

§ 506. **Acknowledgment in court.** — Deeds under particular statutes have sometimes been acknowledged in open court. Under these statutes it is held that a certificate which states that the deed is properly acknowledged, is not defective because it omits to state the name of the grantor. The presumption in such a case is said to be that, inasmuch as the deed was acknowledged in open court, the proceedings of the court were regular. It hence

¹ *Boothroyd v. Engles*, 23 Mich. 19.

would follow, in the absence of opposing proof, that the statute had been complied with, and that the deed had been acknowledged by the proper person, that is, the grantor.¹

§ 507. Acknowledgment of deed by trustee.—When a trustee executes a deed in that capacity, the better practice undoubtedly is to describe him in the certificate of acknowledgment as trustee. But an omission to do so does not render the certificate, for that reason, void. A description of him by his name without designating his fiduciary capacity is sufficient.²

§ 508. Certificate should affirmatively show substantial compliance with statute.—To render the acknowledgment effectual, it must affirmatively appear from the certificate that the requirements of the statute have been substantially observed.³ Thus, the statute in force in

¹ *Wise v. Postlewait*, 3 W. Va. 452; *Philips v. Ruble*, Litt. Sel. Cas. 221. In the first case the court said: "When it is certified that the deeds were acknowledged, the only reasonable construction to be given to the terms used is, to hold that they were acknowledged by the parties whose names are signed to them, as any other construction would render the acknowledgments ineffectual." In the latter case it is said: "As the deed appears to have been acknowledged, although it is not stated by whom that acknowledgment was made, yet as it was done in open court, and admitted to record, we must presume the proceedings in that court correct; and, consequently, must infer that before it was admitted to record, the acknowledgment was made by those persons by whom it purports to have been executed." And see *Hunter v. Bryan*, 2 Murph. 178; 5 Am. Dec. 526. Under a statute authorizing the court to admit to record a deed as to any person whose name is signed thereto, when it shall have been acknowledged by him in such court, a certificate that "at a court held for A. County, February 4, 1867; this deed was produced into court, and, being duly acknowledged, . . . according to law, was thereupon ordered to be recorded," is sufficient to show that the deed was acknowledged before the court on the day named, by the persons whose names are signed to it, and hence was properly recorded: *Peyton v. Carr's Executors*, 85 Va. 456. Even if the language of the certificate be doubtful, yet, if it recites due acknowledgment, and shows an order for recordation, the order will be presumed to have been properly made, until the contrary is shown: *Peyton v. Carr's Executors*, 85 W. Va. 456.

² *Dail v. Moore*, 51 Mo. 589.

³ *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340; *Knighton v. Smith*, 1 Or. 276; *Jocoway v. Gault*, 20 Ark. 190; 73 Am. Dec. 494; *Calumet*

Wisconsin, 1842, required that the officer taking the acknowledgment should certify that "the grantor or grantors was or were known to him or them, or that his, her, or their identity had been satisfactorily proved." The certificate of acknowledgment attached to a deed was: "Be it known that on the thirtieth day of August, in the year of our Lord 1842, before the subscriber, chief judge of the Circuit Court of the District of Columbia, which court is a circuit court of the United States, and a court of record and of law of said district, personally appeared Daniel Webster, the party grantor of the within instrument, and acknowledged the same to be his act and deed; and at the same time personally appeared Caroline Le Roy Webster, the wife of the said Daniel Webster, and acknowledged the said instrument to be also her act and deed." The court held that as the certificate did not show that the grantors were known to him, or their identity proven, it did not substantially comply with the statute, and hence, the deed was not entitled to record.¹ In a

etc. *Co. v. Russell*, 68 Ill. 426; *Smith v. Garden*, 28 Wis. 685; *Fipps v. McGehee*, 5 Port. 413; *Carpenter v. Dexter*, 8 Wall. 513; *Wetmore v. Laird*, 5 Biss. 160. See, also, *Smith v. Elliott*, 39 Tex. 201; *Fryer v. Rockefeller*, 63 N. Y. 268; *Fell v. Young*, 63 Ill. 106; *Toulman v. Heidelberg*, 32 Miss. 268; *Combs v. Thomas*, 57 Tex. 321; *Morse v. Clayton*, 21 Miss. 373; *Hartshorn v. Dawson*, 79 Ill. 108; *Wells v. Atkinson*, 24 Minn. 161.

¹ *Smith v. Garden*, 28 Wis. 685. Lyon, J., said: "It must be conceded, in respect to the form of these certificates of acknowledgment, that a substantial compliance with the law under which they are made is all that is required. The authorities to that effect are numerous and quite uniform: 2 Phillips on Evidence (4th ed. notes), 585, and cases cited. The question is, therefore, whether the certificate of Judge Cranch is a substantial compliance with the law under which it was made. It certainly is not a *literal* compliance therewith, for it does not state expressly that Mr. and Mrs. Webster were known to him, or not being known to him, that their identity was satisfactorily proved. And we think that it is not a *substantial* compliance with the law in those respects. True, the certificate describes Mr. Webster as the party grantor named in the deed, and Mrs. Webster as his wife. But this is not sufficient. The law required that the certificate should show whether Judge Cranch knew them personally, or whether their identity was proved to him by satisfactory evidence. The identity of a person who acknowledges the execution of a conveyance of land is matter of substance; and

case in Alabama, Chief Justice Brickell observes: "The certificate is very informal, and substitutes some words for those employed in the form prescribed by the statute and omits others. Yet, when the deed is examined in connection with the certificate, by fair legal intendment it appears that the grantors, on the day of the date of the deed, acknowledged that with knowledge of its contents, they executed it voluntarily. While courts are constrained to disapprove departures from the simple forms prescribed by the statutes, and though such departures render titles insecure, and invite litigation, liberality and not strictness of construction is the rule which has been observed. The want of substance cannot be disregarded, opening a door for fraud and forgery, and by judicial legislation nullifying the statute—words cannot be added to, or the equivalent of material words found in the statutory forms dispensed with. Yet when it fairly appears that the statute has been substantially complied with, a literal compliance with the literary form is enacted."¹

§ 509. Facts showing compliance with statute must be stated.—All the facts whose occurrence or existence is necessary to the validity of the certificate, must be stated

when the law requires, as it did in this case, that the means by which such identity is known to the officer before whom the conveyance is acknowledged shall be stated in his certificate, the omission to do so must necessarily destroy the validity of the certificate."

¹ Sharpe v. Orme, 61 Ala. 263, 267. In Belcher v. Weaver, 46 Tex. 293, 26 Am. Rep. 267, Chief Justice Roberts, in delivering the opinion of the court, says, upon the point mentioned in the text: "The certificate of the officer should show substantially that the things required by statute had been done. This might be shown in a certificate, wherein each part is not separately presented, but even rather confusedly intermixed, if, upon a consideration of the whole certificate, it could be seen that they had been done. In other words, what is stated in the certificate is intended as a representation on paper of what was done in the discharge of his duty, imposed upon this officer by the law; and, although the representation may blend the parts in one, or use language in making the representation not technically appropriate, still, if the expressions used in making the representation, as the officer evidently meant them to be used and understood, clearly represent the several things to have been done which the law requires, it will be a sufficient certificate."

in the certificate as facts. It is not sufficient for the acknowledging officer to state that the acknowledgment was taken "according to law." As the officer acts in a ministerial and not in a judicial capacity, the presumption cannot arise from his declaration that he has acted "according to law"; that he has done those things essential to the efficacy of his certificate, if he omits to certify them. The facts that he states in his certificate are presumptively true, and cannot well be contradicted save in peculiar cases, where questions of fraud and imposition are raised. But if it were sufficient for him to certify that the acknowledgment was taken conformably to the statute, without stating the facts that render it so, it would follow that he had the power of determining what constituted a valid acknowledgment, or the inquiry would constantly have to be made to ascertain whether he had in fact acted in compliance with the statute. But he has not this power, nor is a person compelled to look beyond the certificate to ascertain whether it is true or not. The presumption is, that the officer certifies truly, and, if the facts are stated in his certificate, they may be accepted as *prima facie* true.¹

¹ Gill v. Fauntleroy, 8 Mon. B. 177; Flanagan v. Young, 2 Har. & McH. 38; Lucas v. Cobbs, 1 Dev. & B. 228; Meddock v. Williams, 12 Ohio, 377. See Jones v. Lewis, 8 Ired. 70; 47 Am. Dec. 338; Wetmore v. Laid, 5 Biss. 160. In Flanagan v. Young, *supra*, the court say: "The justices have power to examine and certify. In this they act ministerially, and not judicially. They have not jurisdiction to decide whether the acknowledgment is according to law, and a certificate that the acknowledgment was according to law is of no avail. It is the province and jurisdiction of the courts to determine the validity and efficacy of deeds, and those solemnities, ceremonies, and requisites on which this validity depends. But if this certificate is adjudged to be sufficient, it will transfer the jurisdiction and power of the courts to ten justices out of doors." In Lucas v. Cobb, *supra*, the court, in speaking of the certificate of acknowledgment of a married woman, says: "In the present case the commissioner's certificate stating that she did acknowledge the same to be her act and deed in *due form* is too vague and uncertain. We cannot tell what is meant by the words 'due form.' Whether the words 'in due form' applies to her having signed, sealed, and delivered the deeds, or to having done these things, and also that they were done with her free and voluntary assent, leaves us in uncertainty, doubt, and con-

§ 510. **Certificate sufficient if equivalent words to those mentioned in the statute are used.**—The statutes relating to acknowledgments generally contain certain forms which are declared to be sufficient. But it is well settled that it is not necessary to pursue the exact language of the statute, provided it is substantially complied with. Though the statute may contain certain words, yet if equivalent words are used in the certificate it will be sufficient.¹ “It is well settled that the exact form of the

jecture. The law never intended that *femes covert* should be deprived of their titles to their lands, but upon the most clear and satisfactory proof that they had fully consented to part with the same. Knowing the influence of the husband, the law is careful and watchful to protect them against that influence. When deeds of this description are properly proved, the statute requires that an order should be made by a judge or the county court that the deed and the accompanying documents should be registered. The commission and certificates are required to be registered, that the court may at all times see that everything required by law to divest the *feme covert* of her title had been complied with; and, also, that the vendee, or those who claim under him, may be always enabled, when they offer the deed in evidence, to show to the court that the title had passed from the *feme covert* according to all the requirements of the statute.” But see *Newcomb v. Smith*, Wright, 208.

¹ *Barton v. Morris*, 15 Ohio, 408; *Vance v. Schuyler*, 1 Gilm. (6 Ill.) 160; *Alexander v. Merry*, 9 Mo. 510; *Young v. State*, 7 Gill & J. 260; *Wiley v. Bean*, 6 Ill. 302; *Davar v. Cardwell*, 27 Ind. 478; *Doe v. Reed*, 3 Ill. 371; *Johnson v. Badger etc. Co.*, 13 Nev. 351; *Morse v. Clayton*, 21 Miss. 373; *Carpenter v. Dexter*, 8 Wall. 513; *Bradford v. Dawson*, 2 Ala. 203; *Warner v. Hardy*, 6 Md. 525; *Hollingsworth v. McDonald*, 2 Har. & J. 230; 3 Am. Dec. 545; *Jacoway v. Gault*, 20 Ark. 190; 73 Am. Dec. 494; *Wells v. Atkinson*, 24 Minn. 161; *Halls v. Thompson*, 1 Smedes & M. 443; *Tiffany v. Glover*, 3 Greene, G. 387; *Talbot v. Simpson*, Peters C. C. 188; *Dickerson v. Davis*, 12 Iowa, 353; *Pickett v. Doe*, 5 Smedes & M. 470; 43 Am. Dec. 523; *Sheldon v. Stryker*, 42 Barb. 284; s. c. 29 How. Pr. 387; *Wise v. Postlewait*, 3 W. Va. 452; *Dorn v. Best*, 15 Tex. 62; *Monroe v. Arledge*, 23 Tex. 478; *Sharp v. Hamilton*, 12 N. J. L. (7 Halst.) 109; *Hartshorn v. Dawson*, 79 Ill. 108; *Talbert v. Dull*, 70 Tex. 675; 8 S. W. Rep. 530; *Muller v. Boone*, 63 Tex. 91; *Wilson v. Simpson*, 80 Tex. 279; 16 S. W. Rep. 40; *Belbaze v. Ratto*, 69 Tex. 636; 7 S. W. Rep. 501; *Belcher v. Weaver*, 46 Tex. 293; 26 Am. Rep. 267; *Watkins v. Hall*, 57 Tex. 1; *Abney v. De Loach*, 84 Ala. 393; 4 So. Rep. 757; *Hobson v. Kissam*, 8 Ala. 357; *Homer v. Schonfield*, 84 Ala. 313; 4 So. Rep. 105; *Sharpe v. Orme*, 61 Ala. 263; *Carter v. Chaudron*, 21 Ala. 72; *Harvey v. Dunn*, 89 Ill. 585; *Calumet etc. Dock Co. v. Russell*, 68 Ill. 426; *Stuart v. Dutton*, 39 Ill. 91; *Delaunay v. Burnett*, 9 Ill. 454; *Livingston v. Kettelle*, 6 Ill. 116; 41 Am. Dec. 166; *Hughes v. Morris*, DEEDS, VOL. I. — 43

certificate given in the statute need not be followed. All that is necessary is a substantial compliance with the statute.”¹ As said by Judge Burnet of the Supreme Court of Ohio: “It will not be seriously contended that the magistrate is bound to use the same language that he finds in the statute. The legislature have not undertaken to prescribe a form of acknowledgment that is to be literally pursued. If the certificate contains the substance of the law, though in the language of the officer, it is sufficient. On any other principle it is a matter of doubt whether the records of the State contain a solitary deed with a valid acknowledgment. It is, however, safe and prudent to adopt the language of the act with but little if any variation, and yet it would be attended with destructive consequences to consider such an adherence as essential to the validity of an acknowledgment. It may become a question, then, how far the magistrate may deviate from the words of the act. I would answer the inquiry by saying that his certificate must contain the

110 Mo. 306; 19 S. W. Rep. 481; *Chauvin v. Wagner*, 18 Mo. 531; *Robson v. Thomas*, 55 Mo. 581; *Owen v. Baker*, 101 Mo. 407; 20 Am. St. Rep. 618; 14 S. W. Rep. 175; *Alexander v. Merry*, 9 Mo. 510; *Newman v. Samuels*, 17 Iowa, 528; *Todd v. Jones*, 22 Iowa, 146; *Bell v. Evans*, 10 Iowa, 353; *Tubbs v. Gatewood*, 26 Ark. 128; *Bigelow v. Livingston*, 28 Minn. 57; *Wells v. Atkinson*, 24 Minn. 161; *Bensimer v. Fell*, 35 W. Va. 15; 29 Am. St. Rep. 774; 12 S. E. Rep. 1078; *Watson v. Michael*, 21 W. Va. 568; *Pickens v. Knisely*, 29 W. Va. 1; 16 Am. St. Rep. 622; 11 S. E. Rep. 932; *Leftwich v. Neal*, 7 W. Va. 569; *McCormack v. James*, 36 Fed. Rep. 14; *Munger v. Baldrige*, 41 Kan. 236; 13 Am. St. Rep. 273; 21 Pac. Rep. 159; *Kelly v. Calhoun*, 95 U. S. 710; *Hall v. Gittings*, 2 H. & J. (Md.) 380; *Brown v. Farran*, 3 Ohio, 140; *Thurman v. Cameron*, 24 Wend. 87; *Claffin v. Smith*, 15 Abb. N. C. 241; *Sheldon v. Stryker*, 42 Barb. 284; 27 How. Pr. 387; *Bigelow v. Livingston*, 28 Minn. 57; 9 N. W. Rep. 31; *Gregory v. Kenyon*, 34 Neb. 640; 52 N. W. Rep. 685; *Becker v. Anderson*, 11 Neb. 493; *Spitznagle v. Vanhesch*, 13 Neb. 338; *Hockman v. McClanahan*, 87 Va. 33; 12 S. E. Rep. 230; *Tod v. Baylor*, 4 Leigh, 498; *Shaller v. Brand*, 6 Binn. 435; 6 Am. Dec. 482; *McIntyre v. Ward*, 5 Binn. 296; 6 Am. Dec. 417; *Russ v. Wingate*, 30 Miss. 440; *Caruthers v. McLaran*, 56 Miss. 371; *Gregory v. Ford*, 5 B. Mon. (Ky.) 471; *Nantz v. Bailey*, 3 Dana, 111; *Woods v. James*, 87 Ky. 511; 9 S. W. Rep. 513.

¹ *Henderson v. Grewell*, 8 Cal. 584.

substance of everything required by law. No substantial part of the provision can be dispensed with."¹

§ 511. Illustrations.—Where the word "are" was omitted from a certificate of acknowledgment so that it read: "On this day personally appeared before me, A. P. Henkins and Elizabeth Henkins, his wife, whose names appear subscribed to the foregoing deed of conveyance as having executed the same, who — personally known to me to be the real persons who, and in whose name the acknowledgment is proposed to be made, and acknowledged the execution thereof as their voluntary act and deed, and for the uses and purposes therein expressed," it was held that the omission was immaterial and the certificate was in substance sufficient.² The words "signed

¹ In *Brown v. Farran*, 3 Ohio, 140, 154. In *Sharp v. Hamilton*, 12 N. J. L. (7 Halst.) 109, it is said: "This deed had been acknowledged before a proper officer, who certified that the grantors acknowledged the same 'to be their act and deed for the uses and purposes therein mentioned,' instead of using the language of the statute, that they 'signed, sealed, and delivered the same,' etc. It is well settled that a substantial compliance with the act on this subject is sufficient without minute attention to form. The acknowledgment in this case is full as *comprehensive* as if done in the language of the act; for it could not be the deed of the parties without embracing the several requisites specified in the act. It was urged, in argument, that the legislature did not intend that parties should use this conclusive, and in some measure technical language, lest it be done unadvisedly; but that they should specify the particulars of the execution in order that the court may judge whether it is in truth and in law their act and deed. But this is an unusual caution, and, as I think, unnecessary. If an instrumental witness swear to the execution of a deed in the language of this certificate, that proof with the possession of the deed by the grantee would undoubtedly be sufficient *prima facie* evidence of due execution."

A certificate stating that a grantor "signed" the deed, instead of stating that she "executed" it, will not vitiate the acknowledgment, as the words are equivalent: *Bensimer v. Fell*, 35 W. Va. 15; 29 Am. St. Rep. 774.

² *Hartshorn v. Dawson*, 79 Ill. 108. Mr. Justice Scholfield, in delivering the opinion of the court, said: "The supposed defect in the certificate is in the omission of the verb 'are' after the relative 'who,' and this is claimed on the authority of *Tully v. Davis*, 30 Ill. 103; 83 Am. Dec. 179. In that case, the word 'known' was omitted, and it was held the omission was fatal. The reason was that it was necessary that the certificate should show that the person acknowledging the deed was known

and sealed," in their ordinary acceptation, are equivalent to the expression "signed, sealed, and delivered," or "executed"; so are the words "without undue influence or compulsion of her husband," equivalent to the expression of her "own free will, without undue influence or compulsion of her husband." And where a statute specifies the latter forms of expression, the former may be used as their equivalent.¹ The words "seal and acknowledge" are held equivalent to "seal and deliver."² The law upon

to the officer taking the acknowledgment, and the court was not authorized to presume that substantial requirements of the statute had been complied with any further than the certificate affirmatively showed. But is the omission here material? Suppose the word 'who,' as well as the word 'are,' had been omitted; would it not in that event have been just as plain that A. P. Henkins and Elizabeth Henkins, his wife, were personally known to the officer taking the acknowledgment, as if those words had been used? The reading then would have been: 'I do hereby certify that on this day personally appeared before me, A. P. Henkins and Elizabeth Henkins, his wife, whose names appear subscribed to the foregoing deed of conveyance as having executed the same, personally known to me to be the real persons,' etc. This form is in common use, and is unquestionably sufficient. It is not possible that any one with a reasonable acquaintance with the language, reading such a certificate, could doubt whether the person acknowledging the instrument was known to the officer taking the acknowledgment to be the person he professed to be. Why, then, should we say that the mere addition of the word 'who,' still omitting the word 'are,' makes the certificate less perfect? The meaning is still no less obvious."

¹ *Tubbs v. Gatewood*, 26 Ark. 128.

² *Jamison v. Jamison*, 3 Whart. 457; 31 Am. Dec. 536. And see *McIntire v. Ward*, 5 Binn. 296; 6 Am. Dec. 417. In *Shaller v. Brand*, 6 Binn. 435; 6 Am. Dec. 482, the certificate declared "she, the said wife, being of full age, separate and apart from her said husband examined, and the full contents made known to her, voluntarily consenting thereto." It being claimed that inasmuch as the certificate did not follow the exact words of the statute, it was invalid, Chief Justice Tilghman, who delivered the opinion of the court, said: "The next question is on the acknowledgment of a deed from Yost Brand and Catharine, his wife, to Christian Brand. The Act of 24th of February, 1770, on which this point arises, directs that the judge who takes the acknowledgment shall examine the wife separate and apart from her husband, and shall read, or otherwise make known to her, the full contents of the deed, and if upon such separate examination she shall declare that she did voluntarily, and of her own free will and accord, seal, and as her act and deed, deliver the said deed without coercion or compulsion of her husband, then the said deed shall be good and valid. It is insisted by the

this subject is correctly stated by Chief Justice Roberts: "The general rule upon this subject is, that there must be a substantial, though not a literal compliance with the terms of the statute, and although words not in the statute are used in the place of others that are, or words in the statute are omitted, yet, if the meaning of the words is the same, or they represent the same fact, or if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the certificate will be held sufficient."¹ It is the policy of the law that certificates of acknowledgment should be upheld whenever substance is found, and they should not be allowed to be defeated by technical and unsubstantial objections. When construing such certificates, the deed itself may be also resorted to.²

§ 512. Omission of the word "personally."—The statutes require that the officer should certify that the person acknowledging the instrument was known to him.

counsel for the defendant that the form prescribed by the law should be strictly pursued; but such has never been the opinion of this court. We have always declared that it was sufficient if the law was *substantially* complied with; on any other principle of construction, the peace of the county would be seriously affected as the certificates of acknowledgment of deeds have generally been drawn by persons who were either ignorant of or disregarded the words of the act of assembly. The law must be complied with, but in construing it we shall always be inclined to suppose a fair conveyance if possible. Now it is here said that the wife was examined apart from her husband, that the contents of the deed were made known to her, and she *voluntarily consented*. It is not straining the expressions 'voluntarily consenting thereto' too far to say that they imply she declared that she executed the deed voluntarily, and that is sufficient; for if the execution was voluntary, it was without coercion or compulsion." The words "legally authorized and assigned," are held to be equivalent to "duly commissioned and sworn": Hall v. Gittings, 2 Har. & J. 380.

¹ Belcher v. Weaver, 46 Tex. 293, 298; 26 Am. Rep. 267, citing Monroe v. Arledge, 6 Ill. 476, 478; Dennis v. Tarpenny, 20 Barb. 376; Owen v. Norris, 5 Blackf. 479; Pardun v. Dobesburger, 3 Port. (Ind.) 389; Gregory's Heirs v. Ford, 5 Mon. B. 481; Langhorne v. Hobson, 4 Leigh, 224.

² Wells v. Atkinson, 24 Minn. 161. See Frostburg Mut. Building Assn. v. Brace, 51 Md. 508.

Sometimes the expression used in the statute is "known to be the person described in the foregoing instrument," in others "personally known," etc. But the omission of the word "personally" does not invalidate the certificate.¹ "But if the officer is satisfied in any manner by the witness, that he knew the grantor named to be the real party, he may take and certify the instrument. So the law itself would seem to use indiscriminately the term 'knowledge and personal knowledge.' It is not easy to define what is personal knowledge, as contradistinguished from knowledge, uncoupled with that epithet. Instances may be stated wherein the difference is apparent; others may be imagined where the distinction is not so easily drawn. No doubt the law intended that as the officer acted under oath in taking proof of deeds, he should have knowledge of the identity of the grantor, or of the subscribing witness, as would enable him to swear that the grantor or witness was the person he represented himself to be. Its object was to prevent one person from fraudulently personating another. It is much to be desired that every officer who takes the acknowledgment of a deed would conform literally to the law. But we know that the convenience of our people require that the taking of the acknowledgment of deeds should be intrusted to those who are ignorant of the forms of the law who will take a proper acknowledgment and blunder in certifying it. Did it follow as a necessary consequence that any acknowledgment improperly certified, had been in fact taken under such circumstances as were unwarranted by law, there would be no difficulty in settling this question. Because an officer omits to certify that the grantor was personally known to him, but merely says he was known, it cannot be inferred that the grantor was not personally known. The con-

¹ *Todd v. Jones*, 22 Iowa, 146; *Rosenthal v. Griffin*, 23 Iowa, 263; *Hopkins v. Delaney*, 8 Cal. 85; *Welch v. Sullivan*, 8 Cal. 511; *Davis v. Bogle*, 11 Heisk. 315; *Hunt v. Johnson*, 19 N. Y. 279; *Sheldon v. Stryker*, 42 Barb. 284; *Jackson v. Gumaer*, 2 Cowen, 552; *Thurman v. Cameron*, 24 Wend. 87; *Tully v. Davis*, 30 Ill. 103; 83 Am. Dec. 179; *Warner v. Hardy*, 6 Md. 525. But see *Gould v. Woodward*, 4 Greene, G. 82.

struction of certificates of acknowledgment have frequently engaged the attention of courts, and they all seem impressed with the importance of extending a liberal construction to these instruments.”¹

§ 513. **Surplusage does not vitiate certificate.**—A certificate that contains all that the law requires is not rendered invalid because it contains more than is necessary. The certificate is unaffected by the surplusage. If a certificate of proof by a subscribing witness of the execution of a deed shows a substantial compliance with the provisions of the statute, it is not vitiated by the fact that the witness adds his signature to the certificate, and the officer appends a jurat in the form attached to an affidavit.² So,

¹ *Alexander v. Merry*, 9 Mo. 514, 525, per Scott, J. This case is cited and followed in *Robson v. Thomas*, 55 Mo. 581. In *Jackson v. Gumaer*, 2 Cowen, 552, the officer certified that the grantor was known to him, but did not add that he knew him to be “the person described in and who executed the deed.” Chief Justice Savage, speaking for the court, said: “Were we called on to establish a form for such certificate, I should certainly be for inserting that the grantor was known to the judge, or other officer taking the acknowledgment, to be the person described in the deed; but the legislature could not expect the officer to know that the grantor described in the deed actually executed it, otherwise than by his acknowledgment, or proof by a witness. The form used in this case has been in very general use, and the practice in this respect may, perhaps, amount to a construction of the act. At all events, I am unwilling to say that titles which depend for proof upon certificates thus drawn, are to be put in jeopardy by the allowance of such a technical objection, for I cannot but consider the acknowledging officer drawing such a certificate as possessing all the knowledge required by the statute.” In *Sheldon v. Stryker*, 42 Barb. 284, Lott, J., delivering the opinion of the court, says, concerning a certificate when the word “personally” was omitted: “He says that such witness was known to him. That is a substantial compliance with the requirement of the law. It is not necessary that the precise language of the statute should be used, and the officer cannot properly certify that he knows the person making the acknowledgment unless he is personally acquainted with him.” See *Shaller v. Brand*, 6 Binn. 435; 6 Am. Dec. 482.

² *Whitney v. Arnold*, 10 Cal. 531. The certificate was in this form: “State of California, county of Sacramento. On this twenty-third day of December, 1856, before me, a justice of the peace, in and for said county, personally appeared Eli Mayo, known to me to be the person whose name appears as a subscribing witness to the foregoing instrument, who, being by me first duly sworn, declared that Henry A. Caul-

in Illinois, where the words "and does not wish to retract" are not necessary to a certificate of acknowledgment by a married woman, their insertion being superfluous, does not vitiate a certificate.¹ And in the same State, where an acknowledgment by a wife to convey the fee of her separate estate contained all that was required for that purpose, and also all that was required to release her dower, the court held that the redundancy did not vitiate the acknowledgment, and aptly remarked: "Redundancy is a very uncommon objection to a certificate of acknowledgment. The complaint has been generally, if not universally, that essential parts required by the statute have been omitted. But where all which the statute does require to effectuate the purpose claimed for the deed is in the acknowledgment, and also something else is put in which the statute does not require, we cannot believe that we should be administering the spirit of the statute, or the principles of justice, to hold that the useless redundancy in the acknowledgment invalidated the deed.

field, known to affiant personally as the person described in, and who executed the foregoing conveyance, executed the same in the presence of affiant, and declared that he executed the same freely and voluntarily for the uses and purposes therein mentioned, whereupon affiant became a subscribing witness. In witness whereof I have hereunto set my hand, Eli Mayo. Subscribed and sworn to before me this twenty-third day of December, A. D. 1856. James Alexander, Justice of the Peace." Mr. Justice Field delivered the opinion of the court, and said: "The form in which the proof of the execution of the deed to the defendant is presented is objected to. It is contended that it is not the certificate of the officer, but merely the affidavit of the subscribing witness. We do not think the objection well taken. The signature of the witness, and the addition of the usual jurat to an affidavit, were unnecessary, and may be rejected as mere surplusage. They cannot vitiate, by their presence, the certificate, if, without them, it shows a substantial compliance with the requirements of the statute. No particular form is necessary to the certificate of the officer." But see *Dugger v. Collins*, 69 Ala. 324. So, the addition to his signature of the name of an office which the officer fills *ex officio*, may be treated as mere description, and disregarded as surplusage: *Owen v. Baker*, 101 Mo. 407; 20 Am. St. Rep. 618; 14 S. W. Rep. 175. So, the addition of the words "Special Deputy": *Thompson v. Johnson*, 84 Tex. 548; 19 S. W. Rep. 784. See, also, *Gray v. Kauffman*, 82 Tex. 65.

¹ *Stuart v. Dutton*, 39 Ill. 91.

It should simply be regarded as surplusage."¹ So, where the law only requires that the clerk shall indorse a certificate of acknowledgment upon a sheriff's deed, the fact that he also adds a copy of the entry which he is required to make on his record does not vitiate the certificate. It is superfluous matter and will be disregarded.² If a clerk's certificate in authenticating the execution and acknowledgment of a deed states, "I further certify that the said instrument is executed, and *proved or* acknowledged according to the laws of this State," it is not so ambiguous as to exclude the deed from admission in evidence.³ The objection urged against this certificate was that the conjunction "or" between the word "proved" and the word "acknowledged" left it entirely uncertain which was done, and consequently there was no authentication in favor of either. But the court approved the rule that "courts will uphold a certificate if possible, and for that purpose will resort to the instrument to which it is attached,"⁴ and added, "it is only needful to apply this rule to demonstrate that the clerk, in using the word 'proved' where it appears, was simply guilty of tautology. He meant by it precisely what the word 'acknowledged' fully and sufficiently expressed. He referred to the certificate of acknowledgment which appeared before him on the deed, and not to a certificate of 'proof,' which did not appear. There was nothing else to which his authentication could apply, and it is only necessary to refer to it as he did to the certificate of acknowledgment to uphold the proceeding."⁵

¹ *Chester v. Rumsey*, 26 Ill. 97, 99.

² *Crowley v. Wallace*, 12 Mo. 143. See, also, *Bradford v. Dawson*, 2 Ala. 203; *Draper v. Bryson*, 17 Mo. 71; 57 Am. Dec. 257; *Tourville v. Pierson*, 39 Ill. 446.

³ *Nelson v. Graff*, 44 Mich. 433.

⁴ As given in *Carpenter v. Dexter*, 8 Wall. 513.

⁵ *Nelson v. Graff*, 44 Mich. 433, per Graves, J. But where the word "or" was used so that a certificate of acknowledgment by a subscribing witness read that he saw the grantor sign or heard him acknowledge that he signed, the uncertainty renders the certificate defective: *Harvey v. Cummings*, 68 Tex. 599.

§ 514. **Clerical mistakes in a certificate.**—The courts attempt to give a liberal construction to certificates of acknowledgment. Acknowledgments are frequently taken before persons of limited skill and knowledge, and while all the requirements of the law have been carefully and scrupulously complied with, yet errors will creep into the certificate which manifestly are clerical. To scrutinize these certificates with severity and declare them insufficient for slight variations, or evident errors, where they substantially comply with the statute, would subserve no desirable end. As an illustration of these remarks, and also of the carelessness with which these certificates are sometimes written, attention may be directed to a case where the certificate of acknowledgment of a married woman stated that “the contents and meaning of said *husband* were fully explained and made known to her,” instead of using the word “deed” in place of “husband.” The word “husband” was considered a mere clerical error, and the certificate was held sufficient as a substantial compliance with the statute.¹ So where the certificate of

¹ *Calumet and Chicago Canal Co. v. Russell*, 68 Ill. 426. Mr. Chief Justice Breese delivered the opinion of the court and said: “But appellee says it was not the contents and meaning of this deed which was explained to her by the magistrate, but ‘the contents and meaning of my husband.’ She insists that the contents and meaning of the *deed* were not explained to her. This certificate must be regarded in a common-sense view; all its parts must be taken together, and a meaning given to it which it is qualified to bear. The only question is, taken as a whole, Is it in substantial compliance with the statute? It is not denied the certificate is completely formal in every respect, save and except that, instead of the contents and meaning of the *deed* being explained to her, the meaning and contents of her *husband* were so explained to her. This is arrant nonsense, but it does not necessarily vitiate and render void the acknowledgment. The meaning and contents of something were explained to the wife, and made known to her, and what that something was is apparent from other portions of the certificate, and shows how the blank should have been filled. Filling it with the word ‘husband’ renders the subsequent portion of the acknowledgment senseless and unmeaning. Placing there the proper word, or leaving it a blank, the vacancy is supplied by the subsequent tenor of the certificate. The magistrate certifies she acknowledged she executed the same—what same? Why, the paper or instrument brought to the notice of the magistrate, the execution of which the parties appeared before him

acknowledgment is full and complete in all its parts, except that the word "his" is omitted before the statement "free and voluntary act," the omission is immaterial, and does not affect the validity of the certificate.¹

to acknowledge. She also relinquished her dower in the premises therein described, 'freely and voluntarily, and without the fear or compulsion of her said husband.' Described in what? Was this a farce being enacted before this officer? No, the parties were rational beings, of business habits, selling real estate every day. To what did she allude when she 'relinquished her dower to the premises therein described'? Certainly to nothing else but the deed, the execution of which they had come before the officer to acknowledge. Where were the premises described, and what did she mean when she said 'therein described'? Could anything else be meant or understood but the deed? These all make certain what word was intended to be put in the blank, but which, by the carelessness of the officer, was not inserted. The doctrine of this court is, that a certificate of acknowledgment need not be in literal compliance with the statute, but is sufficient if there be a substantial compliance. It is very apparent from this certificate that the officer performed every act essential to make a valid acknowledgment by the wife. There can be no doubt it was a deed conveying these lands, signed by her, the contents known to her, its execution her free and voluntary act, done without the fear or compulsion of her husband, and to which lands she fully and freely relinquished all right of dower."

¹ *Dickerson v. Davis*, 12 Iowa, 353. "From the record," say the court, "we should judge that the notary had a printed form, and in filling it up failed to insert this personal pronoun, there being a space left therefor in the acknowledgment. It is very manifest, however, that the mortgagor acknowledged the instrument to be *his* free and voluntary act, and not that of another; and equally clear that the acknowledgment was by Davis, the proper party, and not by a third party. The statute requires, among other things, that the certificate shall show that the party acknowledged the instrument to be his voluntary act and deed. This may be shown, however, by the tenor and form of the certificate, so as to admit the instrument to record, and impart constructive notice thereof to third persons, as well as by the use of the very words, and all of the words of the statute. Of this character was this certificate, and there was no error, therefore, in overruling the objection to the evidence: *Bell v. Evans*, 10 Iowa, 353; *Wickersham v. Reeves*, 1 Iowa, 413; *Pickett v. Doe*, 5 Smedes & M. 470; 43 Am. Dec. 523; *Owen v. Norris*, 5 Blackf. 479; *Vance v. Schuyler*, 1 Gilm. 160; *Merriam v. Harsen*, 2 Barb. Ch. 232." See *Summer v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106. A deed by Jasper M. Williamson, signed "J." M. Williamson and purporting to have been acknowledged by "James" M. Williamson, is admissible in evidence if it appears that it was signed by Jasper M. Williamson, and the writing of the name "James" in the certificate of acknowledgment was a clerical error: *Cheek v. Herndon*, 82 Tex. 146;

§ 515. **Other illustrations.**—In a mortgage executed by a corporation, the word “be” was omitted in the certificate, causing it to read “personally appeared H. G. Rollins, known to me to — the president of the Badger Mill and Mining Company,” etc. This was held a clerical error, which should be disregarded.¹ In a certificate of acknowledgment of a mortgage executed by a corporation, by its attorney duly appointed for that purpose; it was stated that the attorney appeared before the officer, and “acknowledged the foregoing mortgage to be his act and deed.” The court held that although the certificate stated that the attorney acknowledged the instrument as *his* act, yet the import of it was that the deed was acknowledged to be the act of the corporation.² The omission of the word “appeared” in the place in which

17 S. W. Rep. 763. Where the certificate identifies the party as known to the officer to be the person who executed it, the name of the party appearing in the certificate as “Strieber,” while the name signed to the deed is “Schrieber,” it will be presumed to be a clerical error merely, and will not nullify the acknowledgment: *Rodes v. St. Anthony & Dak. El. Co.*, 49 Minn. 370; 52 N. W. Rep. 27. If, in the certificate, the word “the” was used where it should appear “he” executed the same, yet, if the certificate, as a whole, shows that the officer intended to write “he,” and that the omission was a clerical mistake, the deed is admissible in evidence: *Durst v. Daugherty*, 81 Tex. 650; 17 S. W. Rep. 388. A certificate of a married woman’s acknowledgment reciting that she acknowledged that she signed it, and that she “acknowledged such instrument to be — act and deed,” is not defective by reason of the omission of the word “her” before the word “act”: *Gray v. Kauffman*, 82 Tex. 65. That clerical errors should be disregarded, see, also, *Quimby v. Boyd*, 8 Col. 194; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Schley v. Pullman Car Co.*, 120 U. S. 575; *Hornbeck v. Building Assn.*, 88 Pa. St. 64; *Kelly v. Calhoun*, 95 U. S. 710; *Morse v. Clayton*, 21 Miss. 373; *Trammell v. Thurmond*, 17 Ark. 203; *Brunswick etc. Co. v. Brackett*, 37 Minn. 58; *Wells v. Atkinson*, 24 Minn. 161; *Cleland v. Long*, 34 Fla. 353; 16 So. Rep. 272; *Morse v. Clayton*, 21 Miss. 373; *Sumner v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106; 10 So. Rep. 562; *Einstein v. Shouse*, 24 Fla. 490; *Tubbs v. Gatewood*, 26 Ark. 128; *Walker v. Owens*, 25 Mo. App. 587; *Homer v. Schonfield*, 84 Ala. 313; 4 So. Rep. 105; *Durst v. Daugherty*, 81 Tex. 650; 17 S. W. Rep. 388; *Gray v. Kauffman*, 82 Tex. 65; *Agan v. Shannon*, 102 Mo. 582; *Cheek v. Herndon*, 82 Tex. 146; 17 S. W. Rep. 763.

¹ *Johnson v. Badger Mill Co.*, 15 Nev. 351.

² *Frostburg Mut. Building Assn. v. Brace*, 51 Md. 508.

it is usually inserted is a clerical error, and does not vitiate the certificate.¹ A certificate of acknowledgment of a deed made by a married woman complied with the law in all respects, except, instead of saying that the contents were made known to her, it stated "the contents of said indenture being first made fully to her," the word "known" being omitted. The certificate was held to be in substantial compliance with the statute, unaffected by the clerical omission.² A certificate of acknowledgment to a deed in which the instrument is described as "the foregoing mortgage," is a clerical error, and does not impair the sufficiency of the certificate.³ But where a deed was executed by the sheriff who made the sale, and appeared to have been acknowledged by his predecessor in office who made the levy, it was held that the court could not assume that the certificate of acknowledgment

¹ *Scharfenburg v. Bishop*, 35 Iowa, 60.

² *Hornbeck v. Building Assn.*, 88 Pa. St. 64. Mr. Justice Mercur, who delivered the opinion of the court, said: "The certificate in the present case states the separate examination of the wife, and that she declared that she signed, sealed, and delivered the same without any coercion or compulsion of her said husband. To be valid as against her it must also state substantially that the contents were made known to her. Does it do this, 'the contents of said indenture being first made fully to her?' We should so construe these words as to give some effect to them, rather than discard them as void of all meaning. It certainly was not a violent presumption to infer that the word 'known' was inadvertently omitted after the word 'fully,' which the learned judge appears to have done. To rebut such presumption he admitted parol evidence to show that the contents were not made known to her, and that she did not know them. The correctness of this ruling is not now before us, and we indicate no opinion thereon. We prefer to sustain the certificate by giving full effect to the meaning of the language used, without the addition of a single word. The contents being 'made fully' to her, is equivalent to saying they were 'fully made' to her. To say they were fully made to her clearly implies they were communicated to her. If communicated they were made known to her. If the certificate stated that the contents were 'fully communicated to her,' it would have removed all cavil as to their import. The words used are substantially of the same signification, and tantamount thereto."

³ *Ives v. Kimball*, 1 Mich. 308. See, also, *Hughes v. Laine*, 11 Ill. 123; 50 Am. Dec. 436; *Stevens v. Doe*, 6 Blackf. 475; *Owen v. Norris*, 5 Blackf. 479; *Belcher v. Weaver*, 46 Tex. 293; 26 Am. Rep. 267.

contained a clerical error, and that the deed was acknowledged by the same sheriff who executed it.¹

§ 516. **Omission to state immaterial facts.** — A statute in Alabama provides that “any deed of conveyance of real estate may be admitted to record if acknowledged by the makers thereof, or be proved by any of the subscribing witnesses thereto, and the following shall be the form of the certificate of acknowledgment or probate of all deeds: “Personally appeared before me, etc., the above-named A B, who acknowledged that he signed, sealed, and delivered the foregoing deed, on the day and year therein mentioned, to the aforesaid C D.” A certificate to a deed, proper in other respects, omitted the clause “on the day and year therein mentioned.” This was held to be an immaterial fact, whose omission did not invalidate the certificate. “The deed is to be registered,” say the court, “to give notice of its existence, and is to be acknowledged or proved to have been executed before it is recorded, merely to prevent a spurious instrument from being placed upon the records of the county. That is all that the statute requires, and the entire object of the registry being notice, it would be most unreasonable to infer, in the absence of any statute requiring it, that the certificate of the officer taking the probate or acknowledgment should state anything which the statute had not made a prerequisite to such registration. Whether the deed was executed on the day of its date, and all other matters necessary to its validity, must be established by those claiming under the deed, if their title is questioned. The statement of these facts would be therefore wholly useless, to say the least, in the certificate of the magistrate.”²

§ 517. **Comments.**—It certainly seems reasonable that courts should go no further than to say that an inartifi-

¹ *Lincoln v. Thompson*, 75 Mo. 613.

² *Hobson v. Kissam*, 8 Ala. (N. S.) 357, 363. See *Bradford v. Dawson*, 2 Ala. 203; *Carter v. Chaudron*, 21 Ala. 72. The omission of the state-

cial or imperfect statement of a fact required to be stated should not vitiate a certificate. But when they go beyond this, and declare that anything specified in the statute is an immaterial fact, they let down the barriers that the law has thrown around the execution of conveyances. If one fact can be declared to be immaterial, so can another. The safer rule, undoubtedly, is to hold that every fact mentioned in the statute should be stated in some manner, but to extend the utmost liberality of construction to imperfect statements, where there has been substantial compliance with the statute. This course might, in a few particular instances, be attended with hardship, but, on the whole, would be preferable to attempting to separate what is material from what is not, when the statute makes no such distinction.

§ 518. Fact must appear that grantor was known to officer, or his identity established.—The acknowledgment of deeds is one of the means provided by law for the proof of their execution. In an ordinary certificate of acknowledgment there are two essential facts to be stated. One of these is, that the person who acknowledges the instrument is known to the officer taking the acknowledgment, or is proven by the oath of a credible witness to be such person. The other is, that the person so known or identified to the officer acknowledged the instrument. The law accepts the certificate of the officer that a certain person is known to him by a certain name as evidence that that is his true name. Hence, if the certificate fail to show in some manner that the person who acknowledges the instrument is known to the officer, it is insufficient.¹ The fact that the

ment that the deed was executed for the purpose therein expressed is not fatal: *Butler v. Brown*, 77 Tex. 342.

¹ *Gove v. Cather*, 23 Ill. 634; 76 Am. Dec. 711; *Fogarty v. Finlay*, 10 Cal. 239; 70 Am. Dec. 714; *Kimball v. Semple*, 25 Cal. 440; *Hayden v. Westcott*, 11 Conn. 129; *Fall v. Roper*, 3 Head, 485; *Smith v. Garden*, 28 Wis. 685; *Lindley v. Smith*, 46 Ill. 523; *Garnier v. Barry*, 28 Mo. 438; *Brinton v. SeEVERS*, 12 Iowa, 389; *Becker v. Quigg*, 54 Ill. 390; *Miller v. Link*, 2 Thomp. & C. 86; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Peacock v. Tompkins*, 1 Humph. 135; *Callaway v. Fash*, 50 Mo. 420; *Pinckney v.*

person was known to the officer must appear by the use of this term or its equivalent. In Tennessee, the form prescribed by statute was: "Personally appeared before me . . . the within-named bargainer, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." It was held that the words "personally known" are equivalent to "personally acquainted with," and that a certificate in which the officer states that the grantor is "personally known" to him is a compliance with the statute.¹

Burrage, 31 N. J. L. 21; *Rogers v. Adams*, 66 Ala. 600; *Johnson v. Walton*, 1 Sneed (33 Tenn.), 258; *Fryer v. Rockefeller*, 63 N. Y. 268; *Garnett v. Stockton*, 7 Humph. 84; *Kelsey v. Dunlap*, 7 Cal. 160; *Wolf v. Fogarty*, 6 Cal. 224; 65 Am. Dec. 509; *Coburn v. Herrington*, 114 Ill. 104; *Frost v. Erath Cattle Co.*, 81 Tex. 505; 26 Am. St. Rep. 831; *Hughes v. Sloan*, 102 Mo. 77; *Salmon v. Huff*, 80 Tex. 133; 15 S. W. Rep. 1047; *McKie v. Anderson*, 78 Tex. 207; *Hayden v. Moffat*, 74 Tex. 648; 15 Am. St. Rep. 866; *Moses v. Dribbell*, 2 Tex. Civ. App. 457; *Watkins v. Hall*, 57 Tex. 1; *Farrell v. Palestine Loan Assn.* (Tex. Civ. App., March 14, 1895), 30 S. W. Rep. 814; *Hughes v. Morris*, 110 Mo. 306; 19 S. W. Rep. 481; *Hiles v. La Flesh*, 59 Wis. 465; *Merritt v. Phenix*, 48 Ala. 87; *Hart v. Randolph*, 142 Ill. 521; *Irving v. Campbell*, 121 N. Y. 353; *Cannon v. Deming*, 3 S. D. 421; 53 N. W. Rep. 863. It is held that when an administrator executes a deed, that the certificate should state that the grantor was personally known to the officer: *Hughes v. McDevitt*, 102 Mo. 77. In *Brenton v. Seever*, 12 Iowa, 389, the certificate was in this form: "State of Iowa, Mahaska County, ss. On this eleventh day of April, 1854, appeared before me, the undersigned, a justice of the peace in and for said county, the above-named persons, who executed the above conveyance as grantors, and acknowledged the same to be their voluntary act and deed, for the purposes therein expressed. Witness my hand this day and year first above written. William Ballard, J. P." It was held that the deed was defectively acknowledged, because the certificate did not show that the grantors were personally known to the officer as the persons who executed the deed. In *Peacock v. Tompkins*, 1 Humph. 135, the court, per Judge Reese, say: "The certificate is certainly defective in omitting to state that the clerk was acquainted with the bargainer, and perhaps in other particulars. The forms of certificate prescribed by the statutes in cases of probate and acknowledgment must be substantially complied with by the clerk to make the registration effective."

¹ *Kelly v. Calhoun*, 95 U. S. (5 Otto), 710. But see *Hiles v. La Flesh*, 59 Wis. 465. In California, under the statute which requires that the knowledge or proof of identity shall be stated in the certificate of acknowledgment, Mr. Justice Terry, in delivering the opinion of the court,

§ 519. Statement that officer is satisfied of identity insufficient.—The officer is required to state that the grantor is known to him, or his identity has been proven by credible testimony. Any other statement will not suffice. A certificate of acknowledgment stated that the

said, in the case of *Wolf v. Fogarty*, 6 Cal. 224, 65 Am. Dec. 509: "The importance and necessity of this strictness in regard to conveyances is obvious. The certificate under consideration does not comply with the statute, inasmuch as it does not state that the person making the acknowledgment was either known to the notary or proven to be the person whose name was signed to the conveyance. It is contended that the certificate substantially complies with the law, as it contains a positive averment that the party making the acknowledgment was the party whose name was subscribed to the conveyance, and this averment must be construed to be upon the personal knowledge of the officer. According to our understanding of the language, the certificate does not contain such a statement; the words are 'personally, Constant A. Duprey to be the person,' etc; there is evidently an omission in the certificate which may be supplied as well by *claiming* or *representing* himself as by *known* or *proved*. We think the record of a conveyance with a certificate so defective is not notice of title to third parties"; See *Henderson v. Grewell*, 8 Cal. 581.

In *Reynolds v. Kingsbury*, 15 Iowa, 238, where the omission of the word "known" was held to vitiate the certificate, the court say: "A certificate of acknowledgment is good, though not in the language of the statute, provided the words used substantially comply with the object and meaning of the law: *Cavender v. Heirs of Smith*, 5 Iowa, 157. It is sufficient if the words used have the same force and import: *Wickersham v. Reeves and Miller*, 1 Iowa, 413. Not so, however, where the certificate is wanting in language which approximately or otherwise meets the requirements of the statute." In *Tully v. Davis*, 30 Ill. 103; 83 Am. Dec. 179, the certificate had a blank space where the word "known" usually appears, the certificate reading: "This day personally appeared before the undersigned, a justice of the peace in and for said county, Henry M. Trabue, who is personally to said justice to be the real person who executed the foregoing deed, and who there before said justice acknowledged that he signed, sealed, and delivered said deed," etc. The certificate was held insufficient. Chief Justice Caton said: "The objection to the certificate is that the word 'known' is omitted after the word 'personally,' and in its place a blank is left; that is to say, the officer does not certify that he personally knew that the person who made the acknowledgment was the grantor named in the deed. We must undoubtedly be able to learn this fact from the certificate or it is defective. It is certainly true that the officer has not stated this fact in the certificate. It is the statement of this knowledge which he has omitted. Whether he omitted this because he had no such knowledge, or because of carelessness, we cannot know. Even if it were impossible to fill this blank with any

officer was *satisfied* that the person acknowledging the instrument was the grantor named in the deed. This, however, was held insufficient. "The certificate, by whomsoever made, must state that the maker of the instrument was known to him, or proven to him to be the person who executed the instrument. If he is 'satisfied,' he must state how, whether by personal knowledge or by the sworn testimony of a credible witness, whose name is inserted in the certificate."¹ Similar language is used by Mr. Justice Breese of Illinois, in a case where a certificate was held insufficient for the officer's omission to state his knowledge of the identity of the person. "He does not certify that the person executing the power of attorney is personally known to him as the real person in whose name it is executed. 'I am satisfied' are not equivalent words. How satisfied? This should be made apparent in the mode there [in the statute] pointed out, either by personal knowledge or by proof by a credible witness. The certificate, not furnishing this most necessary proof, is defective."² But where the form given in the statute was that the grantor, "known to me to be the person whose

other word or set of words,' and make sense, except the word 'known, we should not be authorized so to fill the blank, for then we should do what the law has required the certifying officer to do. But it is, in fact, as easy to fill the blank so as to make the certificate and acknowledgment void, as to so fill it as to make them good. Who shall say that if the officer had filled the blank with a statement of the truth, he would not have inserted words negating the fact that he had a personal knowledge of the identity of the grantor? But the simple truth is, we have no right to fill the blank at all. We might as well help out any other important part of the certificate by a favorable supposition or intendment as this." And see *Jackson v. Osborn*, 2 Wend. 555; 20 Am. Dec. 649; *Livingston v. Kettelle*, 1 Gilm. 116; 41 Am. Dec. 166. A recital in a certificate that "personally came" the grantors, stating them, by name "known to me to be the persons who executed the foregoing instrument," is a sufficient compliance with a statute providing that the certificate shall state that the person making the acknowledgment was personally known to the officer to be the real person executing the deed: *Schley v. Pullman Palace Car Co.*, 120 U. S. 575.

¹ *Kimball v. Semple*, 25 Cal. 440, 446, per Rhodes, J.

² *Shephard v. Carriel*, 19 Ill. 313, 319; and see *Kimball v. Semple*, 25 Cal. 440; *Fryer v. Rockefeller*, 63 N. Y. 268. But see *Pinckney v. Bur-*
rage, 31 N. J. L. 21; *Hiles v. La Flesh*, 59 Wis. 465.

name is subscribed to the foregoing instrument, acknowledged," and the certificate stated that the grantor, "to me well known, acknowledged," it was held sufficient.¹

§ 520. **In some States officer not required to certify to personal identity.**—In Connecticut, the rule seems to be that the presumption that the officer who took the acknowledgment acted rightly is deemed sufficient, and he is not required to certify his actual knowledge of the identity of the person.² Formerly in New York, all that the statute required to entitle a deed to registration was that the grantor should acknowledge it, and by this act all that the officer was required to do was to certify the fact of acknowledgment. The statute, however, was subsequently amended so as to require the officer to certify his personal knowledge of the grantor.³

§ 521. **Fact of acknowledgment must appear.**—In the statutes relating to acknowledgments, there is one fact that they all require should exist and should appear in the certificate; that is, that the grantor acknowledged that he executed the instrument. It is not indispensable that the word "acknowledge" should be used, if the fact is made to appear by equivalent expressions that the deed was in fact acknowledged. Unless this fact does appear, the requirements of the statute are not satisfied, and the certificate is insufficient.⁴ The omission of the word "acknowledged" is not one of those clerical errors which do not affect the certificate, but the failure to insert it, or an equivalent expression, is a fatal defect, and the omission cannot be filled by intendment or construction. "A court cannot," says Chief Justice Swift, "by intendment or construction, fill a blank or supply a word. They can

¹ *Watkins v. Hall*, 57 Tex. 1.

² *Sanford v. Bulkley*, 30 Conn. 344, 348.

³ *Bradstreet v. Clarke*, 12 Wend. 602, 673; *Crowder v. Hopkins*, 10 Paige, 183, 189; *Northrop v. Wright*, 7 Hill, 476.

⁴ *Stanton v. Button*, 2 Conn. 527; *Bryan v. Ramirez*, 8 Cal. 461; 68 Am. Dec. 340; *Short v. Conlee*, 28 Ill. 219; *Cabell v. Grubbs*, 48 Mo. 353; *Dewey v. Campau*, 4 Mich. 565.

only decide on the meaning and import of the words made use of. Here the words made use of can only import that the person appearing before the justice of the peace was the signer and sealer of the deed; they do not import that he *acknowledged* it, nor are they equivalent to such word. The certificate, then, cannot be made to contain an acknowledgment of the deed, without supplying the word, or supposing the blank to be filled with the word 'acknowledged.'"¹ One of the objects of the statute is to have the acknowledgment operate as an estoppel, and in order that it may have that effect, it is required that the certificate should state the fact of acknowledgment.² Hence it is held that a certificate of acknowledgment is void when made simply on the assurance that the grantor acknowledged the deed.³

§ 522. Equivalent words indicating acknowledgment may be used.—The law looks to substance and not to form. It requires that the *fact* of acknowledgment must be stated, but it does not prescribe any particular language which

¹ *Stanton v. Button*, 2 Conn. 527.

² *Bryan v. Ramirez*, 8 Cal. 461, 464; 68 Am. Dec. 340. "It is 'the fact of *acknowledgment*' that forever afterward binds the party. Although a man may not execute the instrument freely, in point of fact, yet if he make the acknowledgment properly, he is afterward estopped to deny it, as against subsequent innocent parties." See *Henderson v. Grewell*, 8 Cal. 581. In *Caball v. Grubbs*, 48 Mo. 353, 356, it is said by Currier, J.: "The acknowledgment was essential and the proof of it is wanting. The sheriff appeared before the court, apparently for the purpose of acknowledging the deed, but that he did so does not appear. The paper read in evidence as the certificate of acknowledgment fails to show what was done, beyond the fact that the sheriff appeared before the court. The certificate not only omits the word 'acknowledged,' but contains no word or words expressive of any equivalent idea. To hold this acknowledgment good, would be equivalent to holding a sheriff's deed good without any acknowledgment. The omission may have been the merest inadvertence, but it is an omission which the court cannot supply. It constituted the vital part of the acknowledgment, and no rational liberality of construction can cure the defect. In a word, the certificate contains nothing on the point in question to construe."

³ *Mays v. Hedges*, 79 Ind. 288. An instrument may be admitted to record where the acknowledgment is in the body of the instrument and is signed by the grantor, the notary, and witnesses: *Snowden v. Rush*, 69 Tex. 593; 6 S. W. Rep. 767.

shall express this fact. Naturally, the most convenient and acceptable method of declaring that an instrument was acknowledged is to use the word "acknowledge." Then, there is left nothing to construe, and all doubt about other terms being equivalent is dispersed. But if other words are used of equivalent import, the certificate will be sufficient. A certificate that the grantor made oath that he signed, sealed, and delivered the deed, is valid as a certificate of an acknowledgment, though placed in the form of an affidavit.¹ In a certificate of acknowledgment to a deed by a corporation, the officer certified that the president appeared, and, being duly sworn, deposed and said, that the seal affixed to the instrument was the corporate seal of the company, and was so affixed by authority of the board of directors of the company for the uses and purposes therein expressed, and that he by like authority did subscribe his name as president. Although the certificate did not contain the word "acknowledge" it was held to contain words of equivalent import.² Where the statute requires the officer to certify that the grantor "acknowledged that he signed, sealed, and delivered the foregoing deed," a certificate that he "acknowledged the foregoing instrument to be his act and deed," is sufficient.³ A certificate of acknowledgment which states that the grantor of an annexed deed "acknowledged it," is a sufficient compliance with a statute which requires him to "acknowledge the execution of the annexed deed." "An acknowledgment," says Gregory, J., "of the deed is an acknowledgment of its execution;

¹ *Ingraham v. Grigg*, 13 Smedes & M. (21 Miss.) 22; *Chouteau v. Allen*, 70 Mo. 290.

² *Chouteau v. Allen*, 70 Mo. 290.

³ *Halls v. Thompson*, 1 Smedes & M. (9 Miss. 443.) On page 489 the court say: "This is, in effect, a good acknowledgment. A deed is a writing signed, sealed, and delivered. The words used by the justice mean then everything that the statute requires. It is in legal effect a certificate that he acknowledged that he signed, sealed, and delivered the deed—for it was not his deed unless he had done all these things." See, also, *Rainey v. Gordon*, 6 Humph. (25 Tenn.) 345; *Smith v. Williams*, 38 Miss. 48; *Dorn v. Best*, 15 Tex. 62.

it cannot be a deed unless it is executed, and therefore we think that the certificate in question is a substantial compliance with the statute."¹ But it is held that the word "stated" is not the equivalent of the word "acknowledged."²

§ 523. Omission of the word "voluntary." — In Iowa, it is held that under the statute of that State the word "voluntary" in the acknowledgment of a deed is of the essence of the acknowledgment and its omission fatal. A certificate showed that a deed was acknowledged to be the act and deed of the party, but did not state that it was his *voluntary* act and deed. The court said: "The word 'voluntary,' under our statute, is made an important word, and is, in fact, of the essence of the acknowledgment. Have there been words used in the acknowledgment before us of like import? There have not. There is a clear, legal distinction, which has ever existed be-

¹ *Davar v. Cardwell*, 27 Ind. 4; 89 Am. Dec. 477.

² *Dewey v. Campau*, 4 Mich. 5. Under a statute merely requiring an instrument to be acknowledged, without prescribing any form of certificate, or providing what it shall contain, it is sufficient if it fairly appears therefrom that the person who executed the instrument appeared in person before the officer, and acknowledged it as his act and deed: *Brunswick Balke Collender Co. v. Brackett*, 37 Minn. 58; 33 N. W. Rep. 214. For the purpose of upholding a certificate of acknowledgment, resort will be had, if required, to the whole instrument to which it is attached, and whenever substance is found no attention will be given to obvious clerical errors and technical omissions: *Brunswick Balke Collender Co. v. Brackett*, 37 Minn. 58; 33 N. W. Rep. 214. Where a statute provides that the certificate of acknowledgment "must be substantially as follows: 'Before me, ———, on this day personally appeared ———, known to me,'" etc., a certificate using "I" instead of the words "before me," is good: *Belbaze v. Ratto*, 69 Tex. 636; 7 S. W. Rep. 501. A certificate was as follows: "I, J. W. S., clerk of the county aforesaid, do hereby certify that T., one of the above subscribing witnesses, who being duly sworn, in due and solemn form, that he, himself, with P., signed as witnesses when R. signed and acknowledged the foregoing instrument of writing for the purposes therein set forth." The statute required that "one of the witnesses . . . shall swear to the signature of the signer, . . . which shall be certified," etc. The court held that it was evident that the word "says" or "said" was inadvertently omitted, and that, even as it stood, it satisfied the statute: *Talbert v. Dull*, 70 Tex. 675; 8 S. W. Rep. 530.

tween a man's deed and his voluntary deed.”¹ In Nebraska, under the statutory requirement that the grantor must acknowledge the instrument to be his voluntary act and deed, it is held that a simple statement that the grantors appeared before the officer “and acknowledged that they executed the same” renders the certificate of acknowledgment invalid, but that there is a substantial compliance with the statute if the certificate states that the grantors acknowledged the instrument to be “their voluntary act.”²

§ 524. **Omission of certain words under particular statutes.**—With the exception of the statement that the person was known to the officer, and that the instrument was acknowledged, it is impossible to lay down any rule that will harmonize the decisions upon what words may be omitted. Without invalidating the certificate we believe that all *facts* required by the statute should be stated, and their omission held fatal. But clauses are found in the statutes descriptive of certain acts, and the conflict arises among the decisions as to what omissions will invalidate the certificate and what will not. In Arkansas, it is held that the omission of the words “for the consideration and purposes therein set forth,” vitiates a certificate of acknowledgment, for the reason advanced by the court that “we must suppose that these words were used in the statute for some useful purpose, and we have been able to find no authority to warrant their omission.”³ In Texas,

¹ *Wickersham v. Reeves*, 1 Iowa, 413, 417; *Newman v. Samuels*, 17 Iowa, 528; *Dickerson v. Davis*, 12 Iowa, 353. But in *Henderson v. Grewell*, 8 Cal. 581, 584, the court say: “The certificate in this case sufficiently states the identity of the party. The fact of acknowledgment is also sufficiently stated. It is true that it does not state that the party executed the instrument ‘freely and voluntarily’; but this is not essential, and the voluntary execution of the instrument must be presumed from the fact that he acknowledged that he ‘executed the same.’”

² *Spitznagle v. Van Hess*, 13 Neb. 338.

³ *Jacoway v. Gault*, 20 Ark. 190, 194; 73 Am. Dec. 494. In the same State, in the later case of *Little v. Dodge*, 32 Ark. 453, Chief Justice English says, on page 458: “The notary puts the husband and wife together in the commencement of the certificate, and says that they

the statute prescribed that a married woman should declare that she "did freely and willingly sign and seal the said writing, to be then shown and explained to her, and shall acknowledge the said deed or writing so again shown to her to be her act." A certificate of acknowledgment stated that "she declared she had willingly sealed and delivered the same, and that she wished not to retract it," etc. The court held that though the certificate was correct in other respects, it was fatally defective in omitting to state that she willingly *signed* the instrument.¹ The statute in that State also provides that the grantor shall declare that he executed the deed "for the *consideration* and purposes therein stated." But the omis-

'acknowledged that they had signed and sealed the same (the deed) as their act and deed,' and then he drops the husband and takes up the wife. As to the husband, the words, 'for the consideration and purposes therein mentioned and set forth,' are wholly wanting, and such an omission was held to be fatal for the purposes of registration, in *Jacoway v. Gault*, Adm'r. In this case the certificate of the notary as to the wife's acknowledgment omits the words of the statute, 'for the purposes therein contained and set forth,' and no words of similar import are used. The wife is not required to declare that she had executed the instrument for any consideration, for that may go to the husband, but she must declare that she executed it for the 'purposes therein contained and set forth,' in the language of the statute, or in words of similar import, for she thereby indicates that she is acquainted with, or understands, the nature of the conveyance, whether it be an absolute deed, a mortgage, or a lease, etc. It is important that she should know the purposes and contents of the instrument which she is asked to execute, and the certificate of the officer taking the acknowledgment should, by words substantially equivalent to the language of the statute, show that fact. It is safer and better to follow the language of the statute, and to use approved forms. The guards which the lawmakers have placed around the wife to protect her against imposition in the disposition of her estate, are not to be disregarded or displaced by the courts, but to be maintained, and the spirit and intention of the statute enforced."

¹ *Smith v. Elliott*, 39 Tex. 201, 208. The court said: "It will be observed that the certificate does not show that she *willingly signed* the instrument; nor is there in the acknowledgment any equivalent word or expression. There is a clear omission of a material substantive part of the necessary acknowledgment to bind a married woman, whether the conveyance be of her separate property or of a homestead. . . . It is true the very form of words laid down in the statute need not be followed, but no form that leaves out any substantive ingredient of the form laid down will be sufficient."

sion of the word "consideration" in the certificate of acknowledgment does not affect its validity.¹ In Ohio, a certificate of the acknowledgment of a married woman stated that she declared "that she *signed* the same without the fear or compulsion of her said husband," omitting the word "sealed," found in the statute. The court, however, considered that this omission did not affect the certificate.²

§ 525. **Presuming an acknowledgment.**—As the fact of acknowledgment is one of the most essential things to a valid acknowledgment, a certificate which omits to state this fact is invalid. It cannot be presumed, but must

¹ *Monroe v. Arledge*, 23 Tex. 478. "A literal compliance with the statute," says the court, "is not required in authenticating instruments for record, provided there has been a substantial compliance. There must always be such a compliance as meets the objects of the requirements in the statute. The object sought to be attained mainly in the authentication of an instrument for record is the ascertainment of the fact that the grantor did execute it. When it is authenticated by the proof of a witness, who saw it executed, it is only necessary for him to state on oath that he saw the grantor 'subscribe the same': Hart Dig., art. 2791. It is not necessary to the validity of a deed, that the real consideration upon which it is made should be 'therein stated'; and indeed such is very often not the case. Nor would an acknowledgment by him for record, in strict compliance with the statute, preclude him from showing that the consideration and purposes of the deed were other and different from those therein stated. The material matter then embraced in the acknowledgment is the execution of the deed. In this case the grantor is shown by the certificate to have acknowledged that he executed the deed for the purposes therein stated. The deed itself must import a consideration if none be expressed; and if one be expressed, it is not material that the one expressed be the one upon which it was actually made. This, then, is a formal part of the certificate, which for the sake of regularity should be inserted, but its omission does not invalidate the certificate." And see, also, *Belcher v. Weaver*, 46 Tex. 294; 26 Am. Rep. 267.

² *Barton's Lessees v. Morris' Heirs*, 15 Ohio, 408. On page 423 the court say: "The signing, and sealing, and delivery were all done at the same time. This appears from the *testatum* clause of the deed, and from the attestations of the subscribing witnesses. The signing and sealing are one act, done at the same time. The signature adopted the seal already prefixed, and made the same the seal of the grantor, so that in point of fact, there could be no separation. If the signing was done voluntarily, it is impossible the sealing was not equally so." But see *Toulmin v. Heideiberg*, 32 Miss. 268.

either appear by the words used in the statute, or expressions equivalent in meaning. Decisions, however, may be found which do not support this view, and although they do not, in our opinion, state the law outside of the State in which they were rendered, and are opposed by the great mass of authority, it is proper that they should be noticed. In a late case in Maryland, a mortgage executed by a corporation, appointed in its last clause a certain person its attorney "for it, and in its name, and as its act and deed, to acknowledge the mortgage before any person having authority by the laws of the State to take said acknowledgment, in order that the same may be duly recorded." On the same day that the mortgage was executed, the attorney appeared before an officer who certified that "personally appeared W. S., he being known to me to be the person who is named and described as and professing to be the attorney named in the letter or power of attorney contained in the foregoing mortgage or instrument of writing to be the act and deed of," etc., omitting after the word "writing" the words "and acknowledged said mortgage." The court held that the omitted words were supplied with positive certainty by the context, and that what might be clearly implied was of the same effect as if it had been expressed in terms.¹ In an early case in

¹ *Bashor v. Stewart*, 54 Md. 376. In its opinion the court said: "In aid of this certificate, we are required to read it in connection with the other parts of the instrument; and we must, moreover, bear in mind that every reasonable intendment should be made in support of the certificate and the instrument to which it is attached. And so reading the certificate, is there a doubt left in the mind as to what was done by the attorney before the justice, and what act was intended to be certified by that officer? The attorney was authorized by the deed itself to make the acknowledgment, and nothing else. It is but fair to presume that he did what he was authorized to do, and nothing to the contrary. He was certainly before the justice, and it is equally certain that he performed some act there whereby he affirmed the mortgage 'to be the act and deed of the Maryland Inebriate Asylum.' What other act than the acknowledgment of the instrument according to the authority? If from the face of the whole writing, including the certificate, we have enough before us to enable us to determine with certainty what was done, and that the act done was in accordance with the authority delegated, we cannot consistently, with any fair intendment in support of the acknowl-

New York, where a certificate made in 1711 of an acknowledgment of a deed stated that the grantor and his wife came before the officer "to acknowledge this indenture to be their acts and deed," it was held that the certificate did not import alone that the parties came before the officer to acknowledge the deed, or with that intent, but also that they did acknowledge it, and that it would be presumed, after such a lapse of time, that the wife was privately examined.¹

§ 526. *Comments.*—These decisions, if they go to the extent that a certificate may be sufficient which omits to state that the grantor acknowledged the execution of the deed, are in direct conflict with the cases cited in other portions of the treatise, and cannot, by either reason or

edgment, declare it invalid. Here the reading of the acknowledgment, in view of the other evidence furnished by the deed, leaves no doubt as to the act that was done, and the words omitted, by mere clerical misprision, are supplied by the context with positive certainty. What may be clearly and fairly understood or implied, in reading the acknowledgment in connection with the deed, is of the same effect as if it had been in terms expressed. In the case of *Wickes v. Caulk*, 5 Har. & J. 36, the deed offered in evidence was dated the 6th of October, 1707, and the acknowledgment was certified to have been made on the 6th of October, but omitted to state the year, and the deed was recorded on the 8th of January, 1707. There, by inference and intendment, the time of recording was made to correct the date of the deed, and to supply the particular year in the acknowledgment. So, in the case of *Kelly & Martin v. Rosenstock & Stein*, 45 Md. 389, the mortgage bore date the 6th of August, 1872, but the particular day of the month of August, 1872, upon which the acknowledgment was made, was omitted to be stated; and this court held that, by looking to the date of the mortgage, and the clerk's certificate indorsed thereon, of the time when it was filed for record, the particular day of the month when the acknowledgment was made was with certainty supplied."

¹ *Jackson v. Gilchrist*, 15 Johns. 89. The court said: "The inference drawn by the counsel from the form of the certificate of acknowledgment (that the parties came before the magistrate to acknowledge, etc.) that no acknowledgment in fact was made, cannot be correct. An acknowledgment was deemed necessary, and the parties went before the officer for the purpose of making it; and it would be a most unreasonable conclusion that it was not, in fact, done. The officer could hardly have been guilty of so absurd and nugatory an act as to give a formal certificate that the parties came before him to acknowledge the deed, if they did not actually acknowledge it."

authority, be supported. While in the case cited from Maryland, it would seem that the facts warranted a different conclusion from that reached by the court, yet the decision itself proceeds upon the ground that the certificate bore internal evidence that the deed was, in fact, acknowledged, and the court places its ruling on that ground, observing: "Of course, we are not to be understood as giving sanction to any loose construction of these certificates. On the contrary, if we perceived that there was reasonable doubt as to the meaning and real import of the certificate in question, we should feel bound to declare it invalid." This case may then, perhaps, be considered not an affirmation of the proposition that the omission to state the fact of acknowledgment is a mere clerical error, but merely that under the particular circumstances of the case, it appeared from the certificate and mortgage that the instrument was actually acknowledged. In the case in New York, the deed was an ancient conveyance, and the portion of the decision relative to the separate examination of the wife was a *dictum*, as a curative statute enacted in 1771, providing that no claim to real estate of which a person was in possession should be defeated by the pretense that the wife had not been separately examined. As an ancient deed, it was fair to indulge the presumption of a proper acknowledgment, and the case then becomes similar to one in New Jersey, where, on a deed made in 1784, a judge, in accordance with the statute then in force, indorsed a certificate that the party "signed, sealed, and delivered the within deed, in the presence of one Petrus Haring, have perused the same, find no erasures or interlineations, and allow the same to be recorded." The statute did not prescribe any particular form of acknowledgment. The court held the certificate sufficient, Elmer, J., who delivered the opinion of the court, saying: "Nearly eighty years have elapsed since the making and recording of it, and the premises therein described, or at least a considerable part thereof, had been held under it by the grantee and his heirs or assigns. The certificate

plainly imports that the deed was acknowledged, if not in words, by significant and unmistakable signs. An acknowledgment in words from the mouth was not essential; if it was, a deaf and dumb grantor could not have made one. By actually signing, sealing, and delivering the deed in the presence of the judge, the grantor just as plainly acknowledged it to be his deed as if he had so declared by vocal sounds. And if a verbal acknowledgment was necessary, I think it ought now to be presumed to have been made.”¹

§ 527. **Certifying acknowledgment on same paper on which deed is printed or written.**—Generally, it is not necessary to certify the acknowledgment on the same paper on which the deed is written. The general practice is for the officer to attach his certificate on a separate sheet of paper to the conveyance. But where a statute requires the certificate to be written on the same paper on which the deed is printed or written, the requirement must be observed, or else the certificate will be deficient. In Ohio, the statute required the officer to “certify such acknowledgment on the same sheet on which such deed is printed or written.” A certificate of acknowledgment made by a commissioner of deeds in New York, appointed by the governor of Ohio, was made upon a separate strip of paper attached to the deed by a wafer, with the officer’s seal upon the same. This certificate was held to be invalid.² For the purpose of showing the views of the court and the grounds upon which this conclusion was based, we quote this language from the opinion, where the court, after referring to the statute, observes: “The object of the provision was, evidently, to prevent mistakes and fraud, and to give greater certainty to titles within the State. Certain officers of the State are particularly designated to take the acknowledgment of deeds. The parties are required to acknowledge the execution of the

¹ Hoboken Land and Improvement Co. v. Kerrigan, 31 N. J. L. 13.

² Winkler v. Higgins, 9 Ohio St. 599.

instrument before those persons; and none others are authorized to act in their stead. But if a certificate of acknowledgment might be attached to a deed, as a postage-stamp is to a letter, what would there be to prevent the official duty being performed by a deputy only? The justice or other officer intrusted with that duty might deliver his certificate to a stranger to attach to a deed, thus obviating the necessity of any acknowledgment of a deed, in fact, before the officer designated and invested with the official trust. The certificates, when so prepared, would also be liable to be fraudulently obtained and used in certain cases without the knowledge or consent of the commissioner. In such cases as the one under consideration, it is evident, that to hold the attaching of a certificate of acknowledgment, made upon a distinct piece of paper, sufficient evidence of an acknowledgment, would be throwing the door wide open for mistake, fraud, and mischief to enter. The statute referred to authorizes the governor to appoint one or more commissioners in any other of the United States, to take acknowledgment and proof of the execution of any deed or other conveyance, or lease of any lands lying in this State, to be used and recorded in this State. It is presumed that the governor will have respect to the personal qualifications of the one appointed and commissioned by him for the discharge of the important duty. But if that duty may be discharged by barely attaching his certificate to the instrument, what is there to prevent his constituting any scrivener, attorney, or clerk his *deputy*, and furnishing them with his certificates to be attached. Again, it is obvious that other mischiefs than those resulting necessarily from the discharge of the duty by careless or incompetent deputies, might be expected from such disregard of the express provisions of the statute. The facility with which such a certificate of acknowledgment might be removed from one instrument and attached to others would greatly impair the public security against intentional frauds. Indeed, such a certificate of acknowl-

edgment upon a separate piece of paper is alike in contravention of the express language and the undoubted meaning of the statute."¹

§ 528. **Officer cannot impeach his own certificate.** On grounds of public policy the officer who took the acknowledgment is not permitted to impeach his certificate.² He is required to take an oath that he will faithfully discharge his duties, and generally is compelled to give a bond for the proper performance of his official duties. In certifying to the fact that a deed was acknowledged, he performs a solemn official act. To permit him afterward to controvert his certificate, would render title to property uncertain and almost worthless. It would place dangerous temptations before weak or corrupt men, and make every title dependent, not upon recorded evidence, but upon the treachery of memory, and liable to be overcome by the false testimony of those who solemnly certified to the regularity and legality of their acts. For these reasons, public policy demands that whatever other evidence may be admitted, the lips of the officer shall not be allowed to affect the title of others by attempting to falsify what he certified to be true.³ For this reason,

¹ *Winkler v. Higgins*, *supra*, per Sutliff, J. See, also, *Schramm v. Gentry*, 63 Tex. 583.

² *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597; *Stone v. Montgomery*, 35 Miss. 83; *Stockman v. McClannahan*, 87 Va. 33; 12 S. E. Rep. 230; *Camp v. Carpenter*, 52 Mich. 375; *Allen v. Lenoir*, 53 Miss. 321; *Wright v. Bundy*, 11 Ind. 398; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Hays v. Hays*, 5 Rich. 31; *Riecke v. Westenhoff*, 10 Mo. App. 358; *Harkins v. Forsyth*, 11 Leigh, 294; *Garth v. Fort*, 15 Lea, 683.

³ In *Central Bank v. Copeland*, 18 Md. 305, 318, 81 Am. Dec. 597, Mr. Justice Cochran, in delivering the opinion of the court, said: "In our opinion the testimony of Hays, taken to contradict or impeach his certificate of Mrs. Copeland's acknowledgment of the mortgage, was not admissible. That the statements contained in the certificate, under the circumstances, and as between the parties in the case, were open to contradiction by proper and competent proof, cannot be doubted, but it does not follow that a public officer, after the performance of an act required by law, should be permitted to defeat its effect by impeaching his official certificate of the manner in which he performed it. From considera-

testimony that the officer had said that the person making the acknowledgment did not appear before him, but he certified to the acknowledgment because he knew the grantor's handwriting, is inadmissible, both because it is hearsay, and because it impeaches the certificate of the officer.¹ Want of recollection on the part of the grantor or the commissioner who took the acknowledgment, as to the transaction, does not invalidate the certificate.²

§ 529. Between the parties the acknowledgment may be impeached for fraud.—Between the immediate parties to a conveyance, or those who have notice, the certificate of acknowledgment may be impeached for fraud, imposition, or collusion.³ But it cannot be impeached merely

tions of public policy, if from no other, he must be held an incompetent witness for such a purpose: *Harkins v. Forsyth*, 11 Leigh, 294." Where the certificate is apparently regular, irregularities in the taking of it will not defeat it: *Cox v. Gill*, 83 Ky. 669; *Miller v. Wentworth*, 82 Pa. St. 280; *Harpending v. Willey*, 14 Bush, 380; *Jamison v. Jamison*, 3 Whart. 457; 31 Am. Dec. 536.

¹ *Allen v. Lenoir*, 53 Miss. 321.

² *Tooker v. Sloan*, 30 N. J. Eq. (3 Stew.) 394. The Chancellor said: "The certificate contains all the statutory requisites. The acknowledgment was made before a duly authorized person in New York, and the certificate required by law as to the authority of the person by whom the acknowledgment was taken, accompanied the certificate of acknowledgment. There is no evidence to overthrow the certificate of acknowledgment. That the officer by whom the acknowledgment was taken cannot recollect that he examined her separate and apart from her husband, and that she cannot remember whether she was so examined or not, of course cannot countervail the certificate."

In *Wright v. Bundy*, 11 Ind. 398, the acknowledgment of a mortgage appeared to have been made before Samuel Stokes, and the mortgagor delivered it to the mortgagee as genuine. The acknowledgment bore the impress of a notarial seal. A Samuel Stokes, however, testified that he did not, to the best of his recollection, take the acknowledgment, and that he knew of no other notary in the same place of his name. There was also a certificate of the secretary of State that but one Samuel Stokes had been appointed a notary. It was held, however, that this testimony did not disprove the acknowledgment.

³ *Rollins v. Menager*, 22 W. Va. 461; *Schraeder v. Decker*, 9 Barr. 14; 49 Am. Dec. 538; *Jamison v. Jamison*, 3 Whart. 457; 31 Am. Dec. 536; *Barnet v. Barnet*, 15 Serg. & R. 72; 16 Am. Dec. 516; *Williams v. Baker*, 71 Pa. St. 476; *Heeter v. Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46; *Michener v. Cavender*, 38 Pa. St. 334; 80 Am. Dec. 486; *Cressona Sav. etc.*

for irregularity where there is no element of imposition or coercion.¹ The officer's certificate of acknowledgment, if made in proper form, will prevail over the unsupported testimony of the grantor that his signature was forged, in the absence of proof of fraud and collusion on the part of the officer taking and certifying the acknowledgment of the deed.²

Assn. v. Sowers, 134 Pa. St. 354; *Westbrooks v. Jeffers*, 33 Tex. 86; *Miller v. Wentworth*, 82 Pa. St. 280; *Williams v. Baker*, 71 Pa. St. 476; *Rollins v. Menager*, 22 W. Va. 461. See *Hartley v. Frosh*, 6 Tex. 208; 55 Am. Dec. 772; *Worrell v. McDonald*, 66 Ala. 572; *Pierce v. Georger*, 103; Mo. 540; 15 S. W. Rep. 848. See also, *O'Neil v. Webster*, 150 Mass. 572.

¹ *Miller v. Wentworth*, 82 Pa. St. 280; *Shields v. Netherland*, 5 Lea (Tenn.), 193. In the former case, Chief Justice Agnew said: "As to the first, it is to be observed the evidence discloses only irregularity, and no imposition, coercion, or other element of fraud or duress in procuring the acknowledgment. The defendant is a *bona fide* purchaser, for a full consideration, without notice of any irregularity, relying on the certificate of the magistrate, there being nothing on its face to put him upon inquiry. In such a case the certificate is conclusive of the facts stated in it, and parol evidence will not be received to impugn it: *Barnet v. Barnet*, 15 Serg. & R. 72; 16 Am. Dec. 516; *Jamison v. Jamison*, 3 Whart. 457; 31 Am. Dec. 536; *Louden v. Blythe*, 27 Pa. St. 22; 67 Am. Dec. 442; *Williams v. Baker*, 21 Smith, P. F. 476; *Heeter v. Glasgow*, 2 Week. Notes, 1. The cases supporting the exceptions of fraud and duress prove the rule: *Louden v. Blythe*, 16 Pa. St. 532; 55 Am. Dec. 527; *Michener and Wife v. Cavender*, 2 Wright, 384; 80 Am. Dec. 486; *Hall v. Patterson*, Smith, P. F. 289; *McCandles v. Engle*, 1 Smith, P. F. 309.

² *Lickman v. Harding*, 65 Ill. 505; *Russell v. Baptist Theological Union*, 73 Ill. 337. In the former case Mr. Justice Breese delivered the opinion of the court, and said: "The only point in this case is, shall the acknowledgment of the execution of a deed, made and taken before a magistrate in proper form in pursuance of the statute, prevail over the unsupported testimony of the party grantor, he alleging the same to be false and forged? We have no hesitation in answering the question in the affirmative, as it was answered by the circuit court. Public policy requires such an act should prevail over the unsupported testimony of an interested party, otherwise there would be but slight security in titles to land. No fraud or combination between any party and the officer taking the acknowledgment is shown. The magistrate in taking the acknowledgment acts judicially. The duty is imposed upon him by the law of ascertaining the truth of the matters about which he is to certify. Parties act on the faith of his certificate, and in the absence of fraud and collusion, it must be entitled to full credit. There is an entire absence of fraud and collusion in this case, which can vitiate the deed: *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89." That a certificate is only *prima facie* evidence of compliance with the law on the part of the

§ 529 a. Taking acknowledgment through telephone.

In the absence of fraud, duress, or mistake, a certificate of acknowledgment of a married woman cannot be impeached by evidence that the acknowledgment was taken by the officer through a telephone when she was several miles distant at the time the acknowledgment was taken.¹ As the telephone is a modern invention, and its general use has only been recent, the effect to be given to telephonic messages cannot be declared as yet to be definitely settled. It is said, however, by Mr. Justice Barclay, that: "When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified, does not render the conversation inadmissible."² As illustrating the view that courts are inclined to take of conversations held over the telephone, we may call attention to a case decided in Kentucky. A person, whom we may designate as A, went to a telephone office to communicate with another, whom we may designate as B, in

officer, see *Dodge v. Hollingshead*, 6 Minn. 25; 80 Am. Dec. 433; *Anan v. Folsom*, 6 Minn. 500; *Edgerton v. Jones*, 10 Minn. 429; *Hutchison v. Rust*, 2 Gratt. 394; *Jackson v. Schoonmaker*, 4 Johns. 161. But see, also, *Hartley v. Frosh*, 6 Tex. 208; 55 Am. Dec. 772; *Bissett v. Bissett*, 1 Har. & McH. 211. In *Smith v. Ward*, 2 Root, 378, 1 Am. Dec. 80, it is held that the fact that the grantor did not appear before the officer may be shown by parol evidence. A certificate reciting that a married woman was examined by the officer separately and apart from her husband, as required by the statute, is conclusive, both as to *bona fide* purchasers and all others, where there is no fraud or misrepresentation, and cannot be overturned by the mere testimony of the wife and husband that she was not so examined: *Oppenheimer v. Wright*, 106 Pa. St. 569, followed; *Citizen's Savings & Loan Assn. of Ashland v. Heiser*, 150 Pa. St. 514; 24 Atl. Rep. 733.

¹ *Banning v. Banning*, 80 Cal. 271; 13 Am. St. Rep. 156. As to the power to take an acknowledgment through an interpreter, see secs. 537, 538, *post*.

² *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473; 10 Am. St. Rep. 331.

a different city, directing the operator to converse for him, and to call B to the office. The operator answered that he would send for B, and shortly afterward the operator at A's place of residence told him that B was at the office at the latter's place of residence. The operator where A was held a conversation with B, and in a case where the conversation became material, the operator having failed to remember the conversation, it was held that A might prove by himself and others what the operator said as reported by B.¹

§ 530. Grantee must have knowledge of fraud, or of facts sufficient to put him upon inquiry.—While the certificate of acknowledgment may be impeached for fraud or imposition, yet to affect the title of the grantor he

¹ *Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901. The court, per Mr. Justice Holt, said that it was a well-settled rule that where one through an interpreter makes statements to another, the statement of the interpreter made at the time, of what was said, becomes competent evidence against the party. But it also said that it should not be understood as holding the testimony competent on this ground, because there was another reason which seemed conclusive, which the court declared in the following language: "Subject to various qualifications, the old rule, that a party must produce the best evidence within his power to prove a fact, should govern. But as business expands by the aid of new inventions, wider scope must be given to the rules of evidence. There is no need, however, of any departure or innovation in this case, because it is a well-settled rule of evidence that the statements of an agent, when acting within the scope of his agency, are competent against his principal. When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party; and in such a case, certainly, the statements of the operator are competent, being the declarations of the agent, made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person, and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because the person using a telephone knows that there is one at each station whose business it is to act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence." Mr. Justice Pryor dissented.

must have knowledge of such fraud, or the facts within his knowledge must be sufficient to put him upon inquiry. He has ordinarily a right to rely upon the officer taking the acknowledgment. On this point Mr. Justice Chambers, in a case where the certificate of acknowledgment of a married woman was attacked, pertinently observes: "A regard to the policy of the law, for the security of titles and the protection of the rights of property which are passed by conveyances, and assurances of which these acknowledgments and certificates are a common part, will restrain this court from allowing such acknowledgments to be impeached by parol evidence, contradicting the facts certified in the absence of fraud and imposition; and where there are fraud and imposition alleged, the knowledge of it ought to be brought home to the grantee, or of such circumstances within his knowledge of the want of free will and consent on the part of the wife, as should lead him to inform himself of the reality of a free execution and acknowledgment by the wife whose property was to be divested. Where the grantee has knowledge of facts to put him upon inquiry, if silent and inactive on the subject, it is at his peril, and he must abide the consequences."¹ A false

¹ *Louden v. Blythe*, 16 Pa. St. 532, 541; 55 Am. Dec. 527. See, also, *De Arnaz v. Escandon*, 59 Cal. 486; *Grant v. White*, 57 Cal. 141; *Davis v. Kennedy*, 58 Tex. 516. In *Louden v. Blythe*, 27 Tex. 22, 67 Am. Dec. 442, Judge Black, affirming the same principle, says: "A married woman may convey or mortgage her land by joining with her husband in a deed for that purpose. But to make such a deed valid it is necessary to show by legal evidence that no fraud was practiced upon her, but that she executed it with a full knowledge of its meaning, purpose, and intent. It must also be shown that her will was perfectly free, and that her mind accorded with the act. If he uses his influence and power in such manner as to control her unduly, or so as to make her act under his will and not under her own, the deed is void. I do not say that it will be vitiated by the mere fact that she yields to his persuasions, even when she does so against her better judgment. But there must be no imprisonment of her mind, and no unfair advantage taken of her weakness. She must act voluntarily, and not by compulsion, moral or physical. These facts are to be proved in one way only; that is, by the certificate of a judge or justice that he examined her, not in the presence of her husband, but separately; that he made the contents of the deed

certificate of acknowledgment is void when there has been no appearance before the officer. But where the grantor actually appeared, and the certificate is defective, it is conclusive of every fact appearing on its face. Evidence is not admissible to show what occurred at the acknowledgment, for the purpose of impeaching the certificate of acknowledgment, except in case of fraud or imposition in securing it, and where it is shown that the grantee has knowledge of the fraud.¹ And in the case of a married woman, a proper certificate of her acknowledgment is *prima facie* evidence against her. But it is not conclusive except as to a vendee for a valuable consideration without notice, and not a participant in any fraud practiced upon her. As to him, she is estopped from denying an acknowledgment when it has been actually made.²

§ 531. To overcome the certificate, the evidence must be clear and convincing.—The presumption is that the certificate states the truth.³ But if, through fraud or im-

fully known to her; that she declared her execution of it to be voluntary and free from every sort of coercion. Such a certificate is conclusive in favor of a grantee who has accepted the deed in perfect good faith, and paid his money without knowing or having any reason to suspect that it is untrue. But if it be in point of fact false, and if the grantee knew it to be false, or if knowledge can be brought home to him of any circumstance which would put an honest and prudent man upon inquiry, then it may be contradicted by parol evidence." See *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89; *Calumet etc. Co. v. Russell*, 68 Ill. 426; *Lickmon v. Harding*, 65 Ill. 505. See, also, *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Cover v. Mandway*, 115 Pa. St. 338; 2 Am. St. Rep. 552; *Heeter v. Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46.

¹ *Meyer v. Gossett*, 38 Ark. 377. See section 533 a, where this matter is more fully discussed.

² *Holt v. Moore*, 37 Ark. 145. The presumption that a mortgage was acknowledged by the mortgagor's wife is not overcome by the testimony of one witness alone: *Warrick v. Hull*, 102 Ill. 280. Nor can the maker of a deed, even as between himself and the grantee, impeach the certificate by his testimony alone: *Fitzgerald v. Fitzgerald*, 100 Ill. 385. And see *Young v. Duvall*, 109 U. S. 573; *Washburn v. Roesch*, 13 Ill. App. 268; *Downing v. Blair*, 75 Ala. 216.

³ *Baldwin v. Bornheimer*, 48 Cal. 433; *De Arnaz v. Escandon*, 59 Cal. 486; *Young v. Duvall*, 109 U. S. 573; *Washburn v. Roesch*, 13 Ill. App.

position, it does not, it, of course, may be shown to be false. But the evidence that contradicts the solemn declaration of a sworn officer should be clear and persuasive. "To impeach such a certificate, the evidence should do more than produce a mere preponderance against its integrity in the balancing of probabilities; it should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent."¹ In a case in Michigan, the court admitted that there were some suspicious circumstances about the transaction, but observed: "All presumptions of this kind must be treated with reasonable respect to the improbability of misconduct in a reputable officer, or of a forgery which he ought to have discovered if it existed; and the burden of proof was on complainant to make out a plain case."² But of course, when the testimony clearly con-

268; *Grant v. White*, 57 Cal. 141; *Smith v. McGuire*, 67 Ala. 34; *Ray v. Crouch*, 10 Mo. App. 321; *Camp v. Carpenter*, 52 Mich. 375; *Johnson v. Van Velsor*, 43 Mich. 208, and cases cited on page 219. See, also, *Hourtienne v. Schnoor*, 33 Mich. 274.

¹ Mr. Justice Scholfield, in *Marston v. Brittenham*, 76 Ill. 611, 614. The court quotes with approval the language in *Monroe v. Poorman*, 62 Ill. 526: "If the testimony of a wife, who may or may not become a widow, is to prevail over her own deliberate act, done knowingly, and over the testimony of a disinterested officer taking the acknowledgment, there will be but frail securities to titles; for if such evidence is to prevail in one case, it must prevail in all cases; and whenever a woman can be found, and they are numerous, to swear against her own act, there is really no security in titles derived in whole or in part from them." See *Johnson v. Van Velsor*, 43 Mich. 208; *Smith v. McGuire*, 67 Ala. 34; *Waltee v. Weaver*, 57 Tex. 569; *Davis v. Kennedy*, 58 Tex. 516; *Shields v. Netherlands*, 5 Lea (Tenn.), 193; *Worrell v. McDonald*, 66 Ala. 572; *Groten Kemper v. Carver*, 9 Lea (Tenn.), 280; *Riecke v. Westenhoff*, 10 Mo. App. 358; *Cox v. Gill*, 83 Ky. 669; *Strauch v. Hathaway*, 101 Ill. 11; 40 Am. Rep. 193; *Russell v. Baptist Union*, 73 Ill. 337; *Shelton v. Aultman*, 82 Ala. 315; *Hammond v. Hopkins*, 143 U. S. 224; *Banning v. Banning*, 80 Cal. 271; 13 Am. St. Rep. 156; *Sisters v. Catholic Bishop*, 186 Ill. 171; *Knowles v. Knowles*, 76 Ill. 111; *Marston v. Brittenham*, 76 Ill. 611. To impeach the certificate the evidence must be so satisfactory as to produce a conviction of its falseness. A mere suspicion or a preponderance of evidence, not sufficient to create a moral certainty, is insufficient: *Griffin v. Griffin*, 125 Ill. 438; 17 N. E. Rep. 782.

² *Hourtienne v. Schnoor*, 33 Mich. 274, per Campbell, J. And see *Bailey v. Landingham*, 53 Iowa, 722. In *Canal and Dock Co. v. Russell*,

vinces the court that there was fraud or imposition practiced, the certificate must be held for naught.¹

68 Ill. 426, Mr. Chief Justice Breese delivered the opinion of the court, and on page 430 said: The case stands upon the unsupported testimony of appellee of physical inability, by reason of her absence on the thirtieth day of May, 1837, in which absence she is not corroborated by any witness, to execute and acknowledge the deed in question. The question is thus again presented to this court, shall the uncorroborated testimony of a grantor be allowed to prevail over the solemn act of an officer, appointed by law to take the acknowledgment of deeds, and who has certified under the solemn sanctions of his oath, that he did take the acknowledgment? The question was before this court at the September term, 1872, and received our most serious consideration, and we then said that we had no hesitation in answering the question; that the certificate must prevail over the unsupported testimony of an uninterested party, otherwise there would be but slight security in land titles; that public policy demanded such a rule, when no fraud or combination is alleged or proved. The magistrate, in taking the acknowledgment, acts judicially. A duty is imposed upon him by the law of ascertaining the truth of the matter about which he is to certify. Parties act upon the faith of his certificate, and in the absence of fraud and delusion, his certificate must be entitled to the fullest credit, only to be overcome by the strongest and most unequivocal testimony: *Lickman, Ex'r v. Harding*, 65 Ill. 505. A reference is made in the opinion to *Graham v. Anderson et al.*, 42 Ill. 514, 92 Am. Dec. 89, where it was held, in an action of ejectment, that parol evidence was not admissible to impeach a certificate of acknowledgment to a deed. The certificate of the officer as to the acknowledgment must be judged solely by what appears on the face of the certificate, and if that is in substantial compliance with the statute, it ought not to be impeached except for fraud or imposition. Deplorable indeed would be the condition of land titles in this State, and especially in the city of Chicago, where land records have been destroyed by fire, and original deeds also, if a party to one of such deeds could be permitted to allege its non-execution by him, against the certificate of the judge taking it, who may be dead, and his testimony unsupported by any other evidence."

¹ In *Russell v. Baptist Theological Union*, 73 Ill. 337, 341, occurs this language: "It is a rule that the acknowledgment of a deed cannot be impeached for anything but fraud, and, in such cases, the evidence must be clear and convincing beyond a reasonable doubt; and whilst the making of a false certificate would be a fraud on the party against whom it is perpetrated, there is in favor of the officer the fact that he is under his official oath when he grants the certificate, and the liability to indictment, conviction, and infamy, is certainly as strong incentive to truthful and honest action, as is the restraint imposed on an interested witness, struggling for the gain following success in a suit, and escaping loss by default. Hence, the mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate. Nor will it be with slight corroboration."

§ 532. **Evidence.**—The notary is a competent witness for the purpose of showing that the deed was duly executed when its execution is denied.¹ A married woman has the right to show against all the world that she never acknowledged the execution of a deed, and that the certificate of acknowledgment is a fabrication on the part of the officer. But if the fact is that she made some kind of an acknowledgment, the officer's certificate is conclusive as to the terms of the acknowledgment and the concomitant circumstances, in favor of innocent purchasers, who have acted on the faith of the certificate.²

§ 533. **Illustrations.**—In an action to foreclose a mortgage purporting to have been executed by a husband and wife, the husband, at the time the action was brought, being dead, the wife denied that she executed or acknowledged the instrument. She testified that she was ill at the time the instrument appeared to have been executed, and that she was not away from home. Her physician

¹ *Jansen v. McCahill*, 22 Cal. 563; 83 Am. Dec. 84.

² *Donahue v. Mills*, 41 Ark. 421. Mr. Justice Eakin, speaking for the court, said: "The doctrine rests upon public policy, whilst she, as all other persons are, will be protected against a mere forgery, or the fraudulent machinations of those persons or their agents, who seek to derive a benefit from their dishonesty; yet if she does appear before the officer, and make any acknowledgment with regard to the instrument, he is authorized to give assurance by his certificate to all innocent persons, of what the terms of the acknowledgment were, and of the fact that it was made on privy examination. To open any wider door for proof would put a vast amount of property adrift. The law prescribes no set terms in which acknowledgments must be formulated. They are orally made. The officer must judge of their meaning and effect. Manner and gesture, even, may aid him in that, and he must judge whether the husband is far enough away to enable him to certify that the examination was privy. Obviously it would not do to allow the wife herself, or any bystanders to show in opposition to the certificate, and to the rights of innocent persons relying upon it, that the language properly construed did not amount to a negation of undue influence, or confess free and voluntary action; or that her husband was actually so close at hand as to be able to influence her representations or responses. Human memory is too unreliable for that, even if there were not still greater dangers from human caprice and the bias of human interests. The public must be reasonably protected in the confidence which it is compelled to extend to official action."

testified to her ill health at the time the mortgage was said to have been executed. The evidence, on the other side, consisted of the testimony of the notary public, who gave the certificate of acknowledgment, and of experts who testified to the genuineness of her signature upon a comparison with other signatures made by her. The notary did not pretend to state that she appeared before him and acknowledged the instrument, having no recollection whatever on the subject, and, at the time the acknowledgment was made, he had no personal acquaintance with her. His opinion, however, based upon his habit of giving certificates only when the parties did appear before him, was that she actually did acknowledge the mortgage. But in some cases where he was well acquainted with the parties, or in the case of his partners in business, he thought he might have given certificates when the parties did not appear before him, but did not remember any such cases. Throughout his testimony he stated no fact showing that she did really acknowledge the instrument, but gave his reasons for his opinion that she did. The lower court found for the wife, and the supreme court affirmed its decision.¹ In a suit to enjoin

¹ *Borland v. Walrath*, 33 Iowa, 130. Beck, J., who delivered the opinion of the court, said: "The certificate of acknowledgment, we concede, is to have weight in determining the question. It certainly makes a *prima facie* case. This is the least that can be claimed for it. At all events, a party seeking to defeat his deed because it was not acknowledged by him, ought to make a clear case against the certificate of the officer in order to overthrow the instrument. Public policy demands that instruments in writing pertaining to the titles of real estate, which are authenticated in the manner pointed out by the law, should not be lightly set aside. But they cannot be sustained against the positive and explicit evidence of credible witnesses. The evidence as to the genuineness of the signature, based upon the comparison of handwriting, and of the opinion of experts, is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence, or of the most unsatisfactory character. It cannot be claimed that it ought to overthrow positive and direct evidence of credible witnesses who testify from their personal knowledge. It is most used and is most useful in cases of conflict between witnesses as corroborating testimony. On the one hand, we have the signature to the mortgage sustained as genuine by the certificate of acknowledgment, and by the comparison

a sale under a deed of trust on the ground that a wife's signature had been obtained by fraud, the deed of trust purported to have been executed by the husband and wife, and acknowledged before a notary public. She testified, however, that she never executed the deed; that her husband brought her a paper for her signature, and on her inquiring what it was, she not being able to read, he told her that it was a mere matter of form, and she thereupon made her mark, and that her husband delivered the instrument to the *cestui que trust* who was present; that she was not asked by any one whether she acknowledged or executed the deed. Her testimony was corroborated by her husband and three witnesses who had no interest in the result. This evidence was held sufficient to overcome the certificate of acknowledgment.¹ A mortgage made in June, 1837, appeared to have been executed and acknowledged by both husband and wife. The mortgage was foreclosed, and, the husband having died, the wife subsequently filed her petition for allotment of dower in the premises on the ground that she had not joined in the execution of the mortgage. She testified that she was absent from the State from the latter part of the year 1836, to the early part of 1838, and that it was impossible for her to have signed or acknowledged the mortgage at or near its date. Several other witnesses testified that they remembered she was absent about that time, and

of handwritings, upon which are based opinions of experts; on the other, we have the positive evidence of the defendant, whose credibility is not doubted, corroborated in a degree by other testimony. In our opinion, the preponderance is in favor of the defendant. We are free to admit that we are not without doubts, and it is probable that questions of this character can never be determined with absolute convictions of certainty. We feel, however, that it is safer to give credit to the positive evidence of a credible witness than to disregard it upon presumptions that are not of the highest order. We may say just here that a comparison made by us of the signature in question with defendant's genuine writing, used for that purpose before the referee, all of which is before us, has had a tendency to strengthen the conclusion we have just announced in the minds of some members of this court."

¹ Lowell v. Wren, 80 Ill. 238. See, also, Pickens v. Knisely, 29 W. Va. 1; 6 Am. St. Rep. 622; Borland v. Walrath, 33 Iowa, 130.

witnesses who were acquainted with the handwriting of her husband gave it as their opinion that he wrote both signatures. The court, however, held that the evidence was insufficient to overcome the certificate, and that it would presume that the husband had authority to sign the wife's name, rather than that her signature was a forgery.¹

§ 533 a. Further consideration of this subject—No appearance before officer.—When a person appears before the officer for the purpose of acknowledging the execution of a deed, the certificate of the officer is conclusive of the facts recited as against an innocent purchaser relying on the faith of it. But when there has

¹ *Russell v. Baptist Theological Union*, 73 Ill. 337. Mr. Chief Justice Walker, in delivering the opinion of the court, said: "When carefully examined, this evidence, aside from that of appellant, is loose, indefinite, and unsatisfactory. The witnesses, exclusive of appellant, do not swear positively that appellant was absent at the date of the deed, but say she was East on a visit that summer, and they do not remember of having seen her in June of that year. This may all be true, and appellant have been there and directed her husband to sign her name to the mortgage, and have acknowledged it before the justice of the peace; and she may have been in Philadelphia in the early part of June, and yet returned to Chicago by the 20th of that month. Again, a married woman may, as well as others, execute any instrument by having another sign her name to it, if she adopts it and acknowledges it as her own; hence, if it were conceded that her name was written by her husband, we would presume it done by authority, rather than impute what would be a forgery. A man has no more right to sign his wife's name to a paper, by which she can be bound and her rights affected, than he has that of any other person. Then to decree appellant dower in these premises, we must hold that Capt. Russell and the justice of the peace committed forgery. To so hold we must believe he wrongfully, and to defraud Hubbard [the mortgagee], signed his wife's name to the mortgage, and the justice of the peace made a false certificate of her acknowledgment. Before we can find such facts we must have the most clear and satisfactory evidence, whilst here we must hold that the evidence is not of that character." For other cases see *Crane v. Crane*, 81 Ill. 165; *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634; *Spurgin v. Traub*, 65 Ill. 170; *Monroe v. Poorman*, 62 Ill. 523; *Tunison v. Chamblin*, 88 Ill. 379; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89. And see, also, *Hartley v. Frosh*, 6 Tex. 208; 55 Am. Dec. 772; *Hays v. Hays*, 5 Rich. 31; *Wannell v. Kem*, 57 Mo. 478; *Montgomery v. Hobson*, Meigs, 437; *Williams v. Robson*, 6 Ohio St. 510.

been no appearance of any kind whatever—where, in other words, the whole certificate is a fabrication—the rule manifestly should be different. Expressions will be found in the opinions of courts in the various cases in which the question has arisen as to the conclusiveness of the certificate, to the effect that, so far as an innocent purchaser is concerned, the certificate cannot be attacked. But a close examination of these cases will show that there was an appearance of some kind before the officer. But if there has been no appearance of any kind, if the grantor never attempted to acknowledge the instrument, the certificate may be impeached against an innocent purchaser or mortgagee without notice.¹ This question has in some recent cases received careful attention, and the various decisions bearing on the subject have been analyzed and distinguished. In one of these Mr. Justice Head says: “We know the absolute and implied faith and trust which, in practice, purchasers of real estate repose, and must necessarily repose, in the formal and regular certificates of authorized officers, authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned and set aside against purchasers who have parted with valuable interests in reliance on them. Yet, on the other hand, we perceive the manifest injustice of a rule which would de-

¹ *Le Mesnager v. Hamilton*, 101 Cal. 532; 40 Am. St. Rep. 81; *Grider v. American Freehold L. M. Co.*, 99 Ala. 281; 42 Am. St. Rep. 58; *Borland v. Walrath*, 33 Iowa, 130; *Johnston v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Donahue v. Mills*, 41 Ark. 421; *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622; *Meyer v. Gosset*, 38 Ark. 377; *Michener v. Cavender*, 38 Pa. St. 334; 80 Am. Dec. 486; *Williamson v. Carskadden*, 36 Ohio St. 664; *Allen v. Lenoir*, 53 Miss. 321; *Mays v. Hedges*, 78 Ind. 288; *Smith v. Allis*, 52 Wis. 337; 1 Am. & Eng. Ency. of Law, sec. 6, p. 160. In *Le Mesnager v. Hamilton*, 101 Cal. 532; 40 Am. St. Rep. 81, the court say that the cases of *Banning v. Banning*, 80 Cal. 274, 13 Am. St. Rep. 156, where a married woman acknowledged a deed through a telephone and *De Arnaz v. Escandon*, 59 Cal. 486, where the wife appeared before the notary and acknowledged the deed through an interpreter, are to be distinguished from the case where there has been no appearance of any kind before the officer.

prive one of his property without his knowledge or consent, upon the mere baseless fabrication of another. . . . Upon due consideration we are of opinion that the better rule, and the one sustained by the weight of authority, is that, when there has been no appearance before the officer, and no acknowledgment at all made, it may be shown in disproof of the officer's certificate, even against *bona fide* mortgagees and purchasers."¹

§ 533 b. In some cases considered prima facie evidence only.—The question as to the verity imported by a certificate of acknowledgment has frequently been before the courts, and the general rule undoubtedly is, that where there is no fraud, imposition, or duress, the certificate made by the officer taking the acknowledgment is conclusive of all facts which it recites, and which he is required by law to recite.² But there are

¹ In *Grider v. American Freehold L. & M. Co.*, 99 Ala. 281; 42 Am. St. Rep. 58. In *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699, Mr. Justice Campbell said: "All must be subject to the risk of an occasional forgery by officers authorized to take acknowledgments. Although liable to be deceived and imposed on by such an act, no one can claim that a married woman's estate should be divested by forgery; and when she did not in fact appear before the officer to acknowledge, although he may certify that she did, she may show she did not, for his act is wholly without authority, and she but rights herself and wrongs no one in proving the truth of the case, for no one can claim by virtue of a forgery." It has been held that a certificate of acknowledgment is a nullity when made on the assurance of another that the grantor named executed the deed: *Mays v. Hedges*, 79 Ind. 288. See, generally, *Ormsby v. Budd*, 72 Iowa, 80; *White v. Graves*, 107 Mass. 325; 9 Am. Rep. 38; *Warren v. Hall*, 53 Mich. 371; *Webb v. Burney*, 70 Tex. 322; *Singer v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Pouns v. Williams*, 48 Tex. 141; *Rollins v. Menager*, 22 W. Va. 461; *Davis v. Kennedy*, 58 Tex. 516; *Downing v. Blair*, 75 Ala. 216; *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621; *Meyer v. Gosset*, 38 Ark. 377.

² *Johnson v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Shivers v. Simmons*, 54 Miss. 520; 28 Am. Rep. 372; *Stone v. Montgomery*, 35 Miss. 83; *Allen v. Lenoir*, 53 Miss. 321; *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622; *Henderson v. Smith*, 26 W. Va. 829; 53 Am. Rep. 139; *Rollins v. Menager*, 22 W. Va. 461; *Williams v. Pouns*, 48 Tex. 141; *Herring v. White*, 6 Tex. Civ. App. 249; *Davis v. Kennedy*, 58 Tex. 516; *Hartley v. Frosh*, 6 Tex. 208; 55 Am. Dec. 772; *Kocourek v. Marak*, 54 Tex. 201; 38 Am. Rep. 623; *Shelby v. Burtis*, 18 Tex. 644; *Pool v.*

many cases that hold that, while the certificate is strong evidence of the facts which it recites, it is only *prima facie* evidence, and not conclusive. Many of these decisions are based on the language of the statute. For instance, where a statute provided that instruments properly acknowledged might be read in evidence without further proof, "but the effect of such evidence may be rebutted by other competent testimony," the court said: "In order to introduce the deed, etc., in evidence, therefore, it must have been acknowledged, when it becomes *prima*

Chase, 46 Tex. 207; Wiley v. Prince, 21 Tex. 637; Walter v. Weaver, 57 Tex. 571; Fitzgerald v. Fitzgerald, 100 Ill. 385; Lickmon v. Harding, 65 Ill. 505; Post v. First Nat. Bank, 138 Ill. 599; 32 Am. St. Rep. 171; Griffin v. Griffin, 125 Ill. 430; Tunison v. Chamblin, 88 Ill. 378; Monroe v. Poorman, 62 Ill. 523; Russell v. Baptist Theological Union, 73 Ill. 337; Kerr v. Russell, 69 Ill. 666; 18 Am. Rep. 634; Hill v. Bacon, 43 Ill. 477; Calumet etc. Dock Co. v. Russell, 68 Ill. 426; Barnett v. Proskauer, 62 Ala. 486; Shelton v. Aultman etc. Co., 82 Ala. 315; Scott v. Simons, 70 Ala. 356; Miller v. Marx, 55 Ala. 322; Giddens v. Bolling, 99 Ala. 319; Downing v. Blair, 75 Ala. 216; First Nat. Bank v. Ashmead, 33 Fla. 416; Grotenkemper v. Carver, 9 Lea, 280; Shields v. Netherland, 5 Lea, 193; Hourtienne v. Schnoor, 33 Mich. 274; Dikeman v. Arnold, 78 Mich. 455; Johnson v. Van Velsor, 43 Mich. 208; Banning v. Banning, 80 Cal. 271; 13 Am. St. Rep. 156; De Arnaz v. Escandon, 59 Cal. 486; Grant v. White, 57 Cal. 141; Greene v. Godfrey, 44 Me. 25; Riecke v. Westenoff, 10 Mo. App. 358; Addis v. Graham, 88 Mo. 197; Meyer v. Gossett, 38 Ark. 377; Holt v. Moore, 37 Ark. 145; Tooker v. Sloan, 30 N. J. Eq. 394; Marsh v. Mitchell, 26 N. J. L. 497; Hayden v. Westcott, 11 Conn. 129; Young v. Duval, 109 U. S. 573; Insurance Co. v. Nelson, 103 U. S. 544; Wright v. Bundy, 11 Ind. 398; McNeely v. Rucker, 6 Blackf. 391; Murrell v. Diggs, 84 Va. 900; 10 Am. St. Rep. 893; 6 S. E. Rep. 461; Harkins v. Forsyth, 11 Leigh, 294; Burson v. Andes, 83 Va. 445; 8 S. E. Rep. 249; Cox v. Gill, 83 Ky. 669; Harpending v. Wylie, 14 Bush, 380; Keith v. Silberberg (Ky. Jan. 30, 1895), 29 S. W. Rep. 316; Hall v. Patterson, 51 Pa. St. 289; Loudon v. Blythe, 16 Pa. St., 532; 55 Am. Dec. 527; 27 Pa. St. 22; 67 Am. Dec. 442; Heeter v. Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; Carr v. Frick Coke Co., 170 Pa. St. 62; 32 Atl. Rep. 656; Heilman v. Kroh, 155 Pa. St. 1; Cover v. Manaway, 115 Pa. St. 338; 2 Am. St. Rep. 552; Williams v. Baker, 71 Pa. St. 476; Michener v. Cavender, 38 Pa. St. 334; 80 Am. Dec. 486; Shrader v. Decker, 9 Pa. St. 14; 49 Am. Dec. 538; Singer Mfg. Co. v. Rook, 84 Pa. St. 442; 24 Am. Rep. 204; Miller v. Wentworth, 82 Pa. St. 280; Mutual L. Ins. Co. v. Corey, 135 N. Y. 326; Ridgeley v. Howard, 3 H. & McH. 321; Bissett v. Bissett, 1 H. & McH. 211; Moore v. Fuller, 6 Or. 272; 25 Am. Rep. 524; Baldwin v. Snowden, 11 Ohio St. 203; 78 Am. Dec. 303; Ford v. Osborne, 45 Ohio St. 1.

facie evidence of the matter to which it relates, but the legislature has provided that such evidence shall not be conclusive. It was strenuously urged upon the argument that to permit the certificate of the officer taking the acknowledgment to be contradicted by parol proof, would be productive of the most pernicious results, and greatly tend to unsettle the title to real estate. The objection is not without force, although strong reasons may be urged in opposition to this view; yet the regulation of this matter is, doubtless, legitimately within the scope of the law-making power, and where the legislature has prescribed the rule which is to govern, courts are not at liberty to disregard it.”¹

§ 534. **Comments.**—The rule which requires that the evidence to overcome the certificate shall be clear, satisfactory, and convincing, is founded on the soundest legal reason and the most salutary principles of public policy. The certificate standing by itself, without other proof, is *prima facie* evidence of all that it rightfully contains. While not conclusive, it is entitled to the utmost consideration. To say that it does not speak the truth, the evidence ought to be sufficient to leave a clear conviction in the mind of that fact. To allow the certificate to be impeached on slight grounds would be to open the door to perjury. Property might increase in value, and then

¹ Dodge *v.* Hollinshead, 6 Minn. 25; 80 Am. Dec. 433. See, also, as to *prima facie* effect of certificate, Edgerton *v.* Jones, 10 Minn. 427; Hutchinson *v.* Rust, 2 Gratt. 394; Crane *v.* Crane, 81 Ill. 165; Ford *v.* Teal, 7 Bush, 156; Woodhead *v.* Foulds, 7 Bush, 222; Barker *v.* Avery, 36 Neb. 599; Phillips *v.* Bishop, 35 Neb. 487; Jackson *v.* Schoonmaker, 4 Johns. 161; Thurman *v.* Cameron, 24 Wend. 87; Jackson *v.* Hayner, 12 Johns. 469; People *v.* Galloway, 17 Wend. 540; Gillett *v.* Stanley, 1 Hill, 121; Knowles *v.* McCamley, 10 Paige, 342; Jackson *v.* Cairns, 20 Johns. 301; Gabbey *v.* Forgeus, 38 Kan. 62; Smith *v.* Allis, 52 Wis. 337; Smith *v.* Ward, 2 Root, 378; 1 Am. Dec. 80; Linsley *v.* Brown, 13 Conn. 192; Marsh *v.* Mitchell, 26 N. J. Eq. 497; Camp *v.* Carpenter, 52 Mich. 375; Dewey *v.* Campau, 4 Mich. 565; Hourtienne *v.* Schnoor, 33 Mich. 274; Van Orman *v.* McGregor, 23 Iowa, 300; Herrick *v.* Musgrove, 67 Iowa, 63; Morris *v.* Sargent, 18 Iowa, 90; Johnson *v.* Van Velsor, 43 Mich. 208.

after a number of years, if the grantor's own statement could impeach the certificate, the greatest injustice might be done to innocent purchasers, who would be powerless to supply other evidence than that contained in the certificate itself. Yet, while the evidence should be clear, we do not suppose that a party is held to any greater degree of proof than he is when attempting to set aside an instrument for fraud. Courts frequently, in emphasizing the necessity of the proof being clear, use expressions which in their strict literal sense do not state the law. Thus, in one case, the court said that "the evidence must be clear and convincing beyond a reasonable doubt."¹ By this is not meant, it is conceived, that the fact that no acknowledgment was made must be proved beyond a "reasonable doubt," within the technical meaning of these words, for to require this would be to deny relief in most cases altogether, because it is probable that in none could the fact of non-acknowledgment be proved beyond a reasonable doubt. But we regard it as sufficient proof, if after weighing all the probabilities, the evidence shall clearly and strongly preponderate in favor of the party attacking the acknowledgment. If, however, the probabilities balance each other, the soundest principles of public policy and respect for the security of land titles demand that the certificate of acknowledgment should not be set aside.

§ 535. Innocent grantee protected.—As to the facts which the officer is bound to certify, his certificate is conclusive in favor of an innocent grantee who has become such for value and without notice. As stated by the Supreme Court of Pennsylvania, the certificate "is not conclusive as between the parties in cases of fraud and imposition, or of duress, and may be overcome by parol evidence; it is conclusive as to subsequent purchasers for a valuable consideration without notice. But it is conclusive of such fact only as the magistrate is bound to

¹ Russell v. Baptist Theological Union, 73 Ill. 337, 341.

record and certify, not of facts which he is not required to certify under the provisions of the statute.”¹ Mr. Wharton thus states the law: “The true view is that the certificate of acknowledgment is *prima facie* proof of the facts it contains, if within the officer’s range, but is open to rebuttal between the parties by proof, gross concurrent mistake, or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the acknowledging officer to certify if he has jurisdiction.”²

¹ *Williams v. Baker*, 71 Pa. St. 476, 482; *Schrader v. Decker*, 9 Barr. (9 Pa. St.) 14; 49 Am. Dec. 538; *Hall v. Patterson*, 1 Smith P. F. (Pa.) 289; *Miller v. Wentworth*, 82 Pa. St. 280.

² Wharton on Law of Evidence, § 1052; and he cites in support of this statement the following authorities: 3 Wash. Real Prop. (4th ed.) 326; *Smith v. Ward*, 2 Root, 374; 1 Am. Dec. 80; *Jackson v. Schoonmaker*, 4 Johns. 161; *Thurman v. Cameron*, 24 Wend. 87; *Schrader v. Decker*, 9 Barr. 14; 49 Am. Dec. 538; *Hall v. Patterson*, 51 Pa. St. 289; *Williams v. Baker*, 71 Pa. St. 482; *Duff v. Wynkoop*, 74 Pa. St. 300; *Heeter v. Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46; *Miller v. Wentworth*, 4 Week. Notes, 88 (82 Pa. St. 280); *Eyster v. Hathaway*, 50 Ill. 521; 99 Am. Dec. 537; *Wannell v. Kem*, 57 Mo. 478; *Tatum v. Goforth*, 9 Iowa, 247; *Borland v. Walrath*, 33 Iowa, 130; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772; *Dodge v. Hollingshead*, 6 Minn. 25; 80 Am. Dec. 433; *Edgerton v. Jones*, 10 Minn. 427; *Fisher v. Meister*, 24 Mich. 447; *Hourtienne v. Schnoor*, 33 Mich. 274; *Johnson v. Pendergrass*, 4 Jones (N. C.) 479; *Ford v. Teal*, 7 Bush, 156; *Woodhead v. Foulds*, 7 Bush, 222; *Hughes v. Colman*, 10 Bush, 246; *Bledsoe v. Wiley*, 7 Humph. 507; *Westbrooks v. Jeffers*, 33 Tex. 86; *Landers v. Bolton*, 26 Cal. 406. But in *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486, *Woodward, J.*, who delivered the opinion of the court, said that “this court has held the official certificate of acknowledgment conclusive of every fact appearing on the face of the certificate, and has excluded parol evidence of what passed at the time of the acknowledgment, except in cases of fraud and duress. But in cases of fraud and imposition, or of duress, parol evidence has been freely admitted to overthrow the certificate, as in *Schrader v. Decker*, 9 Barr. 14, 49 Am. Dec. 538, and *Louden v. Blythe*, 4 Harris, 532, 55 Am. Dec. 527, and s. c., 3 Casey, 25, 67 Am. Dec. 442. And where fraud and duress have been practiced in obtaining the acknowledgment, knowledge of it is to be brought home to the grantee, or of such circumstances as would lead him to inquiry upon the point. Such is the doctrine of the cases in our books, and on the strength of it the learned judge ruled that the gross blunder, if not fraud, of the alderman in certifying to the separate examination and acknowledgment of a wife who had not signed the mortgage or appeared before him, could not affect *Cavender*, the mortgagee, because he was not present when the mort-

§ 536. Omission of essential word not cured by insertion in record.—The case may occur where the certificate of acknowledgment omits to state some material fact, but the recording officer either accidentally through habit, or by design, inserts the proper word or clause in

gage was acknowledged, and was never informed of what passed, and that he was presumed to be a *bona fide* purchaser. If the doctrine of notice is to be applied in this manner, no married woman's estate is safe, and the statutes that have been passed for her protection are as worthless as waste paper; for whenever her husband goes into a conspiracy to strip her of her lands, the transaction is not likely to be attended with any circumstances of notice that are susceptible of proof. Here, for instance, is a mortgage made upon Mrs. Michener's separate estate, made to a conveyancer and duly witnessed and acknowledged, which, for aught that appears of record, she never saw nor heard of until she was sued upon it by this *scire facias*. Her name appears to the printed copy in our paper books, but when and by whom it was subscribed to the original instrument does not appear. It certainly was not there when the alderman witnessed and acknowledged the mortgage. The statute requires the signature to precede the acknowledgment, and without signature and acknowledgment, according to the statute, it is not, and cannot be, a mortgage of her estate. To call the mortgagee a *bona fide* purchaser, and to put her to proof that she knew she had been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery out and out, and Cavender chose to invest his money in a purchase of it, must it be enforced because he did not know that he was buying a forged instrument? An instrument known to be forged would not be purchased, and would, therefore, be worthless to the forger. Counterfeit notes would never be issued if a herald went before to proclaim their spuriousness. But because they are taken without notice, do they become genuine? Is every bank and individual to redeem whatever obligations *bona fide* holders may obtain against them, without regard to the question whether the obligation was ever issued or not? To carry the doctrine of notice to such extent would subvert all law and justice. A purchaser of real estate who finds the deeds in the channel of the title all duly acknowledged, is certainly not required to go up the stream and inquire of every married woman if she executed her deed voluntarily and acknowledged it according to law; and if he pay his money on the faith of such title deeds, he is to be protected, and this is probably all that was meant by what judges have said about purchasing without notice. But a mortgagee is not a purchaser of an estate, though, for the purpose of the recording acts, he is sometimes treated as one. He acquires neither an equitable nor a legal estate in the premises mortgaged. He is simply a lienholder, a holder of a security for money. His assignee takes the mortgage subject to all defenses, unless he inquire of the mortgagor and learn that there are none. And he is in no better condition than his as-

the record. If a person who has no actual knowledge of a conveyance thus defectively acknowledged, subsequently purchases the property, the question arises, Is he charged with constructive notice of the deed spread out on the records? It is held that he is not. Thus, in Iowa, the insertion of the word "voluntary" or its equivalent is essential to a certificate of acknowledgment, and its omission is a fatal defect. The recorder, however, inserted the word in the record-book, although it was omitted in the certificate; but to the argument that the defect had been obviated by this act of the recording officer, the court said: "It would be unsafe and dangerous to establish the precedent, that the recorder could change the language of instruments filed for record, and thereby make them read differently from what they did when made and entered into by the parties."¹ Nor can the omission of a material fact be supplied by parol evidence.²

signee. It is not usual, I know, for mortgagees to watch the execution and acknowledgment of the instrument. They generally rely on the integrity of the judicial officer who certifies the acknowledgment. But where the estate is that of a married woman, and the mortgagee himself a conveyancer, and holds, as from the revelations of this mortgage we perceive Mr. Cavender holds, other mortgages against the same married woman, we are of opinion that before he advanced more money on the faith of her estate, it was his duty to consult her. The doctrine of notice, as deduced from the adjudged cases, does not apply here. It was never intended for such a case as this." A defective acknowledgment can be taken advantage of only by a purchaser for a valuable consideration: *Bishop v. Schneider*, 46 Mo. 472; 2 Am. Rep. 533; *Mastin v. Halley*, 61 Mo. 196; *Choteau v. Burlando*, 20 Mo. 482. See, also, *Pierce v. Fort*, 60 Tex. 464; *Pouns v. Williams*, 48 Tex. 141; *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621; *Hall v. Patterson*, 51 Pa. St. 289; *Henderson v. Smith*, 26 W. Va. 829; 53 Am. Rep. 139; *Webb v. Varney*, 70 Tex. 322; *Henderson v. Terry*, 62 Tex. 281; *Johnston v. Wallace*, 53 Miss. 331; 24 Am. Rep. 699; *Johnson v. Van Velsor*, 43 Mich. 208; *White v. Graves*, 107 Mass. 325; 9 Am. Rep. 38; *Singer v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Young v. Duvall*, 109 U. S. 573; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Downing v. Blair*, 75 Ala. 216; *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622; *White v. Graves*, 107 Mass. 325; 9 Am. Rep. 38; *Heilman v. Kroh*, 155 Pa. St. 1; *Cressona Association v. Sowers*, 134 Pa. St. 354; *Shelton v. Aultman & T. Co.*, 82 Ala. 315; *Moore v. Fuller*, 6 Or. 272; 25 Am. Rep. 524; *Davis v. Kenney*, 58 Tex. 516.

¹ *Newman v. Samuels*, 17 Iowa, 528, 549.

² *Jourdan v. Jourdan*, 9 Serg. & R. 268; 11 Am. Dec. 724; *Watson v.*

§ 537. **Acknowledgment through interpreter.** — An interesting question arises when the person who desires to acknowledge the execution of a deed is unable to speak the language of the country in which the officer acts, and the officer himself can only become acquainted with the intention of such person through the aid of an interpreter. The question whether the officer may act upon information imparted to him by an interpreter sworn by him, or may explain the contents of the deed by such interpreter, has been before different courts, and upon such question conflicting decisions have been rendered. In one case, an acknowledgment of a deed of an Indian woman was taken by means of an interpreter, and the court held that there was no law authorizing this course, and that the certificate was, therefore, defective.¹ Mr. Justice Wilson, who delivered the opinion of the court, said upon this point: "But the most palpable error on the face of the certificate is, that the notary public took the acknowledgment in a manner entirely unauthorized by law. There is no law authorizing the notary to swear an interpreter in a case of an acknowledgment. It was, in fact, taking an acknowledgment by mere hearsay. This error is too manifest to admit of discussion. If the circumstance that the notary did not understand the vernacular language of the squaw would justify the intervention of an interpreter, no man would feel safe in any property, a claim to which might be supported by proof so easily obtained. Such a practice would lead to endless frauds, and cannot be sanctioned." But in another case, where the certificate stated that a married woman, on an examination separate and apart, without the hearing of her husband, on being made acquainted with the contents of the conveyance through "Frank Alzine, an interpreter duly sworn," acknowledged its execution, it was held that this was sufficient, and that it was not essential that the

Bailey, 1 Binn. 470; 2 Am. Dec. 462; *Ennor v. Thompson*, 46 Ill. 214; *Harty v. Ladd*, 3 Or. 353.

¹ *Dewey v. Campau*, 4 Mich. 565.

contents of the deed should be made known to her by the officer himself.¹ Mr. Justice Field said: "The certificate is sufficient in all particulars. The officer taking the acknowledgment of a married woman to a conveyance is directed to see that she is made acquainted with the contents of the instrument. He is thus authorized and required to use the ordinary and customary mode of communicating the information to her. If she understands our language, that would be the appropriate vehicle of communication; if a foreigner, ignorant of our language, the employment of a sworn interpreter would be the natural means in analogy to the course pursued in taking testimony in the courts of justice; if deaf, and she reads writing, the information might be given by the pen; or, if she understood them, by the signs employed by mutes. The officer will comply with the law when he avails himself of the common means used by men in the ordinary transactions of life, exacting from the agents employed the security of an oath. It is not necessary, however, for him to state in his certificate in what manner the information is imparted."² In a late case in

¹ Norton v. Meader, 4 Saw. 603, 625.

² In the case of Chestnut v. Shane's Lessee, 16 Ohio, 599, Birchard, C. J., speaking of the language of the statute of that State, requiring the officer to inform a married woman of the contents of the instrument, or "otherwise make known" the same to her, by way of illustration as *dicta* said: "The object of the separate examination of the wife being in part to enable the officer to make known to her the contents and legal effect of the deed upon her rights, it being necessary that he should be satisfied that this object has been attained, before he could lawfully take and certify her acknowledgments, it is manifest that the means he must employ would require to be varied to accommodate the capacity or condition of the grantor. These words 'otherwise make known,' are directory, mandatory, and very comprehensive, admitting and requiring the employment of all the means of communicating knowledge that the necessity of any case might require. In many cases, the private examination would fail entirely in accomplishing the object of the law without the intervention of an interpreter. No form for certifying the examination is prescribed. The nature of the officer's duty is such that neither the legislature nor an intelligent lawyer would ever attempt to furnish a form that would meet all cases and answer the object in view, if the statute in fact contemplated a certificate of the facts done, and explanations given, so full that the courts in after times can judge

California, where a deed had been made by a husband and wife, the answer of the wife alleged, and the court found, that her acknowledgment to the deed was taken through an interpreter, who did not give to her a correct interpretation of the instrument, but informed her that it was a mortgage. But it was not alleged or found that the grantee had any knowledge of these facts, and the court held that the certificate of the notary was conclusive as to the facts it stated.¹

§ 538. **Comments.**—If an interpreter may not be employed in a proper case, it perhaps would be impossible for a large number of persons to acknowledge the execution of any conveyance. If a foreigner in this country is unable to find an officer who understands his language, to say that his acknowledgment may not be taken by means of an interpreter is to say, in effect, that it cannot

whether the requisitions of the act in this respect were complied with, as was held by a majority of the court in *Meddock v. Williams*, 12 Ohio, 377. Upon such a construction we should repeat what was well said by Judge Burnet, in *Brown v. Farran*, 3 Ohio, 140: ‘If this is the true construction, it is not probable that a legal certificate of acknowledgment can be found or was ever made in this State.’ The magistrate’s certificate that he read the deed is not sufficient to answer the objects of the law under such a construction. Reading the deed may or may not have made the wife acquainted with the contents of it. If of German, Welsh, French, or any foreign extraction unacquainted with the English language, reading of the deed to her would have been a mere farce without the aid of an interpreter. It would have been a fraud upon the woman, and a fraud committed against the spirit of the law. And again, how could anyone judge that in the case supposed, with the aid of an interpreter, the contents of the deed were made known, unless it appeared from the certificate that the interpreter was sworn, and what he did and said, and how he interpreted into the foreign language the contents of an English deed of conveyance. This view of the subject need not be dwelt upon in order to prove that the legislature contemplated relying upon the official oath of the officer for his faithful performance of the portion of the statute which is directory to him, or to prove that they did not mean to require a full statement of the means by which he had made known to the *feme covert* the contents of a deed.”

¹ *De Arnaz v. Escandon*, 59 Cal. 486. See, also, *Banning v. Banning*, 80 Cal. 274; 8 Am. St. Rep. 37, where this case is cited with approval. See, also, *Waltee v. Weaver*, 57 Tex. 569; *Herring v. White*, 6 Tex. Civ. App. 249. See Cal. Civil Code, § 1201.

be taken at all. It may, however, be objected, that the statute should provide for an interpretation, and that as the law concerning acknowledgments is purely statutory, the omission, if it be such, to authorize the employment of an interpreter is in reality a negation of the power to take an acknowledgment in this mode. But we do not so view the law. The officer complies with the law when he uses the ordinary means of imparting information or acquiring knowledge. There can in reason be no more objection to informing a person, unable to speak the language of the officer, of the contents of an instrument, by means of an interpreter, than there can be by writing the same on a piece of paper and reading it. There is, of course, the possibility that the interpreter may interpret falsely. But if he acts under oath, this possibility, unless there is evidence that he in fact fraudulently misinterpreted, should, in the writer's opinion, be entitled to little weight.

§ 539. **Amendment of certificate—Decisions that such power exists.**—Can an officer amend his certificate, when as written, it fails to state some essential fact? On this question there is a conflict of authority. In a case in Indiana, it was held that the officer could at any time correct his certificate of acknowledgment. In the case cited the acknowledgments were those of married women, and the certificates omitted to state that the acknowledgments were made out of the hearing of their husbands. The lower court decided that the officers who took the acknowledgments could not correct the certificates so as to insert the fact that they were examined without the hearing of their husbands.¹ But the supreme court considered this ruling erroneous, saying: "We think that the officers had the right, and indeed that it was their duty, to correct at any time any mistake in their certificates. Such a certificate is an act *in pais*, which may be altered at any time by the officer who made it."² The cer-

¹ *Jordan v. Corey*, 2 Ind. 385; 52 Am. Dec. 516.

² Citing *Elliot v. Piersol*, 1 Pet. 328.

tificate does not depend for its validity upon its being made matter of record. A deed without such a certificate as the statute requires cannot be recorded. If the acknowledgments were really made by said married women without the hearing of their husbands, that fact might have been inserted in the certificates, at the trial, *nunc pro tunc*, by the officers who made them. The certificates after such amendment, would have had the same effect, as respects this cause, as if they had at first been properly made." This case is still recognized as authority in Indiana, and in a recent case in that State in which it was cited it was said, of a notary's certificate: "If in truth he had not stamped the certificate with his official seal, he still had the power to do it."¹

§ 540. In Mississippi, a deed intended as a mortgage was properly executed by husband and wife, and acknowledged. The officer who took the acknowledgment failed at the time to sign the certificate of the wife's acknowledgment, but the certificate was written out and appended to the deed. The deed was recorded, and ten months later the officer discovered the omission and informed the wife of the fact. She admitted that she had appeared before him and acknowledged the deed ten months before, and he then appended an additional certificate to that effect. The court, speaking of the acknowledgment, and the officer's power to amend it, said: "The officer who takes it performs a judicial act in determining whether it was acknowledged in the mode and manner required by law; and he is required, by his certificate, to authenticate the judicial conclusion to which he has arrived. This certificate he must sign; and if he fails to do so, the instrument cannot be recorded, or, if recorded, will not constitute notice to third persons. But there is no requirement in the statute that the certificate shall be made, much less signed, in the presence of the woman. We apprehend that in practice it frequently, if

¹ Stott v. Harrison, 73 Ind. 17, 20.

not usually, happens that the certificate is written out and signed after she has retired. If an hour elapses, or a day, is the instrument thereby avoided? We think not. The judicial act has been performed when she has made, and the officer has received, her separate acknowledgment. The memorial of it, the making up of the record, so to speak, which follows afterward, is a ministerial or clerical act, and, where the rights of third persons have not intervened, may be done at any time while the officer remains in office.”¹

§ 541. In Missouri, another case of this class was decided, where it was held that an officer may amend his certificate voluntarily, or execute a proper certificate when he has made a defective one, if such action is warranted by facts which really exist; and that he may be compelled by mandamus to execute a proper certificate, in case of his refusal.²

§ 541 a. In Texas, in a recent case, where a certificate of acknowledgment had been amended, but where the court held, on other grounds, that a deed purporting to convey a wife's separate property was inoperative as a conveyance, it said, however: “But in order to prevent any misconception which may arise from the opinion of the court of civil appeals upon that question, we will say, that if the point were before us, we are inclined to think that we should be constrained to hold that the officer, while in office, had power to amend his certificate. There has been no decision in our court upon the question, but the previous intimations of the court are in favor of that

¹ Harmon v. Magee, 57 Miss. 410, 415, per Chalmers, J. See, under Tennessee Code, Brinkley v. Tomeny, 9 Baxt. 275; Grotenkemper v. Carver, 4 Lea (Tenn.), 375. And see, in Kentucky, Ralston v. Moore, 87 Ky. 571.

² Wannall v. Kem, 51 Mo. 151. But see Gilbraith v. Gallivan, 78 Mo. 452. See Griffith v. Ventress, 91 Ala. 366, 24 Am. St. Rep. 918, where Wannall v. Kem, 51 Mo. 151, is criticised, and the court say that the language of the court has been declared to be *obiter dictum* by later authorities in the same State.

view.¹ It must, however, be conceded, as we think, that the weight of authority elsewhere supports the opinion of the court of civil appeals.”²

§ 542. **Decisions that such power does not exist.**—But the decisions referred to in the preceding sections are not generally accepted as authority. In a case in California, the court said it deemed it unnecessary to criticise the case of *Jordan v. Corey*,³ as it thought it wholly unsupported by authority.⁴ Mr. Justice Baldwin, in delivering the opinion of the court, thus forcibly presented the question: “It is contended, however, that this certificate may, when completed and recorded, and after it has left the hands of the officer, be altered or amended, or an entirely new certificate be made, and this we presume—for we see no limitation to the principle—at any distance of time, at least, so long as he continues in office. The statute seems to contemplate but one certificate. It speaks of but one. That certificate is evidence for certain purposes; but what would be the effect if several certificates were allowed, some qualifying or contradicting the rest, might not be so easy to determine. If two could be given, why not a dozen? If within six months, why not within six years? If the certificate amendatory of the former, why not in contradiction of it, denying all acknowledgment of the deed? If in respect to one class of deeds, why not to all? And what would this lead to but the putting all land titles in the power of unscrupulous notaries, or leaving them to the mercies of their memories? These certainly are serious questions. We should have some very strong reasons or weighty authorities to sustain a proposition out of which such results may grow. We have been furnished with only two cases which seem to approach the principle con-

¹ Citing *McKellar v. Peck*, 39 Tex. 381; *Peck v. McKellar*, 33 Tex. 234.

² *Stone v. Sledge*, 87 Tex. 49; 47 Am. St. Rep. 65, per Gaines, A. J.

³ 2 Ind. 385; 52 Am. Dec. 516.

⁴ *Bours v. Zachariah*, 11 Cal. 281, 298; 70 Am. Dec. 779. In *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918, the court say that *Bours v. Zachariah*, *supra*, is directly in point, and adopt its reasoning.

tended for by the appellants. This, itself, is no inconsiderable argument against the pretension. Very many controversies have grown out of the alleged defective acknowledgments, and most of these have been, perhaps, in consequence of misprision or fault of the notaries or other officers certifying. Some of these have been hard cases upon purchasers. The rights of the wife have often, indeed, in most of the cases, been recognized and maintained. If the sense of the profession and the bench had not been decidedly against the power of the officer to amend the certificate, it is very strange that the attempt had not been made to amend it; especially as will be shown hereafter, as it has been frequently attempted to prove the facts omitted by parol; and that, too, by the evidence of the notary. By how much speedier a process could all this have been effected, if a notary's certificate could at once have been amended, or a new one made out. The ground upon which the power in question is rested, is that the certificate of a notary is an act *in pais*, which he may exercise by virtue of his office, and at any time while in office; and that the amending of his acts is in pursuance of the same general authority which enables him to do them. But we think this is not correct. A notary derives his power from the statute over these subjects. The special duty and authority of taking and certifying acknowledgments is given him. But he acts as an officer with a special authority for each particular case. He is, in other words, acting as under a special commission for that case, clothed with a limited statutory power. He is to take the acknowledgment and certify it as parts of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority. He has exhausted his whole power over the subject, as much as a special commissioner, created for a particular purpose after the adjournment, or a court after the lapse of the term. If we were to look to analogies, we see nothing which upholds this pretension. If, as in some of

the States, particular officers clothed with authority to take depositions return them to court, it would scarcely be contended that they had the power, months afterward, to amend them, or to make return of new facts not appearing on the return, when they closed the commission; nor could any other officer, except by virtue of some statutory power, after he had made return of his proceedings; nor officers charged with special inquisitions." This is settled law in California. In a recent case where the principle was affirmed, and this case cited, Mr. Justice McKee observed: "In taking the acknowledgment the officer acts judicially; and if he blunders in certifying to an acknowledgment duly made, or makes a defective or false certificate, he cannot alter or amend it, because after taking the acknowledgment and delivering the return, his functions cease and he is discharged from all further authority."¹

¹ *Wedel v. Herman*, 59 Cal. 507, 514. See, also, *Durfee v. Garvey*, 65 Cal. 406. In *Elwood v. Klock*, 13 Barb. 50, the court, per Allen, J., after referring to the various acts concerning the acknowledgment of deeds by married women, said: "In each of the acts referred to, the certificate of the officer that the acknowledgment of the execution of the conveyance was made upon a private examination of the wife apart from her husband, was made essential to the operation of the deed. Without this certificate no estate of a *feme covert* could pass by deed. The law required not only the private examination, but it also required the certificate of the fact to be made at the time, and as a part of the transaction, and the fact could not under these statutes be made to appear except by the certificate. The certificate took the place of the record of the examination in open court, and performed the same office: See *Elliot v. Piersol*, 1 Peters, 328. In the revision of the Laws of 1830, the same provision was substantially re-enacted. The language employed is slightly different, and the provision in relation to a certificate is placed in a section by itself. It is provided: (1) That no estate of a married woman shall pass by any conveyance not acknowledged as required by the act; and (2) that the officer who shall take such acknowledgment shall indorse a certificate thereof, signed by himself on the conveyance, and in such certificate shall set forth the matters therein before required to be done: 1 Rev. Stats. 758, §§ 10, 15. The statute still looks to the certificate as containing the evidence that its requirements have been complied with to enable the deed to become operative. The execution of a deed by one not under disabilities may be operative to pass an estate without an acknowledgment, and the execution may be proved by any competent evidence. Not so of a deed of a *feme covert*. No estate passes

§ 543. In Illinois a mistake in a certificate of acknowledgment can be corrected only by the parties reacknowledging the deed. The officer cannot himself alter or amend his certificate.¹ In that case it was contended that a subsequent certificate of the acknowledgment of a married woman, written by the officers some years after the making of the first, cured the defective certificate, even if there was no reacknowledgment of the deed. But the court responded: "We have been referred to no precedent for such action, and we would confidently expect that none could be found. Anciently, such acknowledgments could

except the conveyance is acknowledged as required by law. The disabilities of the wife are only removed by a strict compliance with the statute. As no deed can be recorded except upon a proper certificate of acknowledgment, a deed of a *feme covert* cannot take effect for any purpose except upon a like certificate. A deed cannot be recorded upon parol proof of its proper acknowledgment; neither can the estate of a married woman pass by parol evidence of the acknowledgment of the execution. If the acknowledgment can be established by the examination of the officer as a witness, years after the transaction, it may be established by the testimony of any other credible witness who may have knowledge of it, and perhaps by the admission of the wife herself to a third person that the requirements of the statute had been complied with; thus substituting parol evidence, or a verbal admission, for the solemn and formal written evidence required by statute. There is no evidence that the revisers or the legislature designed to change the effect of the former statutes upon this subject. The change in the language does not necessarily imply a change in the statutes revised: *Crosswell v. Crane*, 7 Barb. 191, and cases cited at page 195. I think that a conveyance of a married woman can only become operative upon her private examination before a proper officer, duly certified by him, and that it cannot be established by parol: See 2 Cowen & Hill's Notes (1st ed.), 1247, n. 874. A deed duly acknowledged may be read in evidence upon the certificate of the acknowledgment, without further evidence of its execution; but I apprehend that if the certificate omitted to state some essential fact—as, for instance, that the officer knew the grantor, or the subscribing witness, if the execution was proved by him—it could not be helped out by evidence of the fact omitted, so as to entitle the deed to be read in virtue of the certificate thus fortified. The acknowledgment is a nullity unless properly certified."

¹ *Merritt v. Yates*, 71 Ill. 639; 22 Am. Rep. 128. If the officer joins the wife in the same certificate as her husband, he cannot, after the deed has been once delivered and recorded, add a separate certificate for her, unless she be present and reacknowledge the deed: *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241.

only be taken in open court, and entered on the records of the court in proceedings tedious, expensive, and encumbered with much form. It was at that time regarded of too much moment to be left to the loose and uncertain action of unskillful persons, and the title to property held by married women was guarded with such care as only to permit it to be divested by the judgment of a court of record. Justices of the peace and the other enumerated officers have, however, under our laws, been intrusted with the power to take and certify such acknowledgments, and when in conformity with the statute, the act is clothed with the same force and effect that was anciently produced by a court of record. It is said that courts of record permit amendments to their records, sheriffs to amend their returns, and compel officers by *mandamus* to perform legal duties. There is no rule more rigidly enforced than that the opposite party must have notice in all cases of amendments of records in matters of substance, and the amendment here is of the very essence of the conveyance itself. And it is true that the court in a proper case, and on notice to the opposite party, will permit the sheriff to amend his return.¹ But we are aware of no statute or common-law practice which authorizes or in any manner sanctions the right of justices of the peace to amend their records after they once have been made. To allow a justice to make alterations and changes in his records at will, and according to his whim, would be fraught with evil and wrong that would be oppressive. Such a power has not been intrusted to the higher courts, and cannot be exercised by these inferior jurisdictions. The case supposed of compelling a justice of the peace who refuses to make any certificate by *mandamus* is not parallel with this case. Here, the justice of the peace, at the time, granted his certificate, and it imports verity. We do not concede that the Circuit Court has power to compel a justice of the peace, by *mandamus*, to correct a judgment when entered, by mistake, for too large or too small a

¹ Citing *O'Conner v. Wilson*, 57 Ill. 226.

sum, or to correct a certificate of acknowledgment in which a mistake has occurred. Such a process cannot be used to correct judgments of inferior courts, and the acknowledgment and certificate take the place of the judgment of former times, and import verity, and cannot be contradicted any more than can a judgment. It may be, that the carelessness of the justice has produced hardship and wrong, but that is not a ground for violating rules that have governed the purchase and sale of real estate from the organization of our State. The defendant must be left to his action against the justice, or on the covenants in the deed, or any other remedy he may have in law or in equity.”¹

§ 544. In Virginia, a suit was brought by a widow to have her dower assigned to her in certain lands conveyed in a previous deed, but the certificate of acknowledgment of which, so far as it related to her, was defective. One of the defendants filed an answer in which it was alleged that she had really made a perfect acknowledgment, but that the certificate, through accident and mistake, did not set out the true facts. The answer was rejected because it was sought to prove by parol testimony what could only be proved by the record. The defendant then offered to file an answer, in which it was stated that since the filing of the former answer, that application had been made to the clerk who took the acknowledgment to make a full record of his action, which he did of the date of the former certificate, and that the deed with the subsequent certificate had again been recorded. But the court rejected the answer, holding that the certificate could not be

¹ Merritt v. Yates, *supra*, per Walker, J. And to the same effect, see Enterprise Transit Co. v. Sheedy, 103 Pa. St. 492; 49 Am. Rep. 130; Griffith v. Ventress, 91 Ala. 366; 24 Am. St. Rep. 918; Cox v. Holcomb, 87 Ala. 589; 13 Am. St. Rep. 79; Sharpe v. Orme, 61 Ala. 263; Scott v. Simmons, 70 Ala. 357; Rogers v. Adams, 66 Ala. 600; Miller v. Marx, 55 Ala. 338; Cahall v. Citizens' Mut. Building etc. Assn., 61 Ala. 232; Cresson etc. Assn. v. Sowers, 134 Pa. St. 354; Manufacturers N. Y. Co. v. Douglass, 130 Pa. St. 283; First Nat. Bank v. Paul, 75 Va. 594; 40 Am. Rep. 740; Stone v. Sledge, 87 Tex. 49; 47 Am. St. Rep. 65.

amended, and that the amended certificate was not an official act.¹

§ 545. In the Supreme Court of the United States it was said relative to the power of an officer to amend the certificate of acknowledgment of a married woman: "Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record of the deed was made? We are of opinion he had not. We are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was in its nature but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio*, as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duties of the clerk were only to keep and preserve the record safely. If the clerk may, after a deed together with the acknowledgment or probate thereof have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it. The doctrine that a clerk may, at any time, without limitation, alter the record of the acknowledgment of a deed made in his office, would be, in practice, of very dangerous consequence to the land titles of the country, and cannot receive the sanction of this court."²

§ 546. Comments.—We have presented the principal decisions on either side of this question at considerable length, because the question is one of importance. In most of the cases, the question has been raised in relation to the certificates of married women, but the rule must affect

¹ First National Bank of Harrisonburg *v.* Paul, 75 Va. 594, 600; 40 Am. Rep. 740. See, also, McMullen *v.* Eagan, 21 W. Va. 233.

² Elliot *v.* Piersol, 1 Peters, 328, 341.

and govern all acknowledgments. As the acknowledgment of a married woman is a part of the deed, one of the acts essential to the validity and operation of her conveyance, a defect in the certificate of acknowledgment is a defect in the deed itself. Hence, in the case of an acknowledgment of a married woman, the right to amend a defective certificate is the right to amend the deed. To say that such a power exists in the officer who took the acknowledgment, is to say that he possesses the power of giving efficacy to the inoperative act of a married woman, without her consent. It must be obvious, therefore, that, at least so far as the certificate of acknowledgment of a married woman is concerned, a defective certificate cannot be amended. The same rule, we conceive, must apply to the acknowledgments of persons *sui juris*. Between the parties the deed is valid and effectual with a defective acknowledgment or with none at all. But if the certificate of acknowledgment does not substantially comply with the statute, the deed when recorded does not impart notice, and cannot, without proof of its execution, be introduced in evidence. It certainly would be a dangerous practice to allow the certificate of acknowledgment to be amended by inserting some essential statement that had been omitted, so as to convert a defective and ineffectual certificate of acknowledgment into a valid and operative one. If such a power exists, the rights of third persons acquired before the amendment might be seriously affected. Besides, as was observed in one case, the right to add a statement to the certificate carries with it the right to detract from it, to strike out some material statement essential to its validity. For if the right to amend exists at all, the officer must have the unqualified power of determining in what particulars the certificate requires alteration or correction. In the opinion of the writer, therefore, the safest and soundest rule is that after the certificate has left the officer's hands, he possesses no power, without a new acknowledgment, to amend or alter his certifi-

cate. As long as the instrument remains in his hands he can write a dozen certificates if he desires, and correct them in any manner that he pleases, but after he has given a certificate, and the papers have passed out of his hands, his power over them ceases. This is a reasonable rule, for in all cases a new acknowledgment can be made if the grantor himself desires to correct a defective certificate, and if he does not desire to do so, the officer should not be given the right of his own volition to effect the result. There is one consideration that does not seem to have been noticed, and that is this: Suppose there has been no new acknowledgment, but the officer has corrected the certificate with the grantor's consent—has, for instance, informed him of the fact, and the grantor assented to it. It might be said in a case of this kind, it seems to us, if the rights of others had intervened, that the grantor would be estopped from attacking the certificate for the reason that it would not have been amended, save for his consent.¹

§ 547. **Proof by subscribing witness.**—It is generally provided that the execution of an instrument may be proven by the oath of a subscribing witness. The certificate should state that the witness was present at the time at which the deed was executed.² Where a deed is attested by two witnesses, an affidavit stating that the witness saw the grantor sign, seal, and deliver the deed at the time and for the purposes therein mentioned, that he saw the other sign as a witness, and that he also signed as a witness, each in the presence of the other, is sufficient proof of its execution.³ But an affidavit that the witness saw the grantor "assign" the deed, meaning, of course, sign, is not sufficient, as it is silent on the question of

¹ In accordance with the views above stated, it was held in a recent case that an officer who has made a defective certificate of a married woman's acknowledgment to a deed cannot correct the defect after the expiration of his term, although he still holds the office by virtue of a re-election: *Griffith v. Ventress*, 91 Ala. 366; 24 Am. St. Rep. 918.

² *Norman v. Wells*, 17 Wend. 136.

³ *Green v. Glass*, 29 Ga. 246.

delivery.¹ Generally the subscribing witness must be personally known to the officer taking the acknowledgment to be the person whose name is subscribed as a witness, or it must be proven that he is such by the oath of some credible witness.² But in some cases it is held that it is not necessary for the certificate to state either of these facts, but that it will be presumed that the officer taking the acknowledgment had satisfactory evidence of the identity of the person purporting to be the subscribing witness.³ A certificate stating that the witness "testified that he saw the within grantor sign the same," but which fails to show that the witness stated that he knew the person who executed the deed, is not sufficient.⁴

¹ *Doe v. Lewis*, 29 Ga. 45.

² See Cal. Civil Code, § 1196.

³ See *Jackson v. Harrow*, 11 Johns. 434; *Kellogg v. Vickory*, 1 Wend. 406; *Johnson v. Prewitt*, 32 Mo. 553; *Jackson v. Phillips*, 9 Cowen, 94.

⁴ *Jackson v. Osborn*, 2 Wend. 555; 20 Am. Dec. 649. And see *Gillett v. Stanley*, 1 Hill, 121. See as to a sufficient compliance with the North Carolina statute, *Starke v. Etheridge*, 71 N. C. 243. A certificate stating that a person appeared and swore that he was well acquainted with the handwriting of the subscribing witnesses "having frequently seen each" of them, and that one of them was dead, and the other had been a non-resident of the State for many years, is fatally defective, because it does not state that the signatures are in the handwriting of the witnesses: *Anderson v. Logan*, 99 N. C. 474; 6 S. E. Rep. 704.

